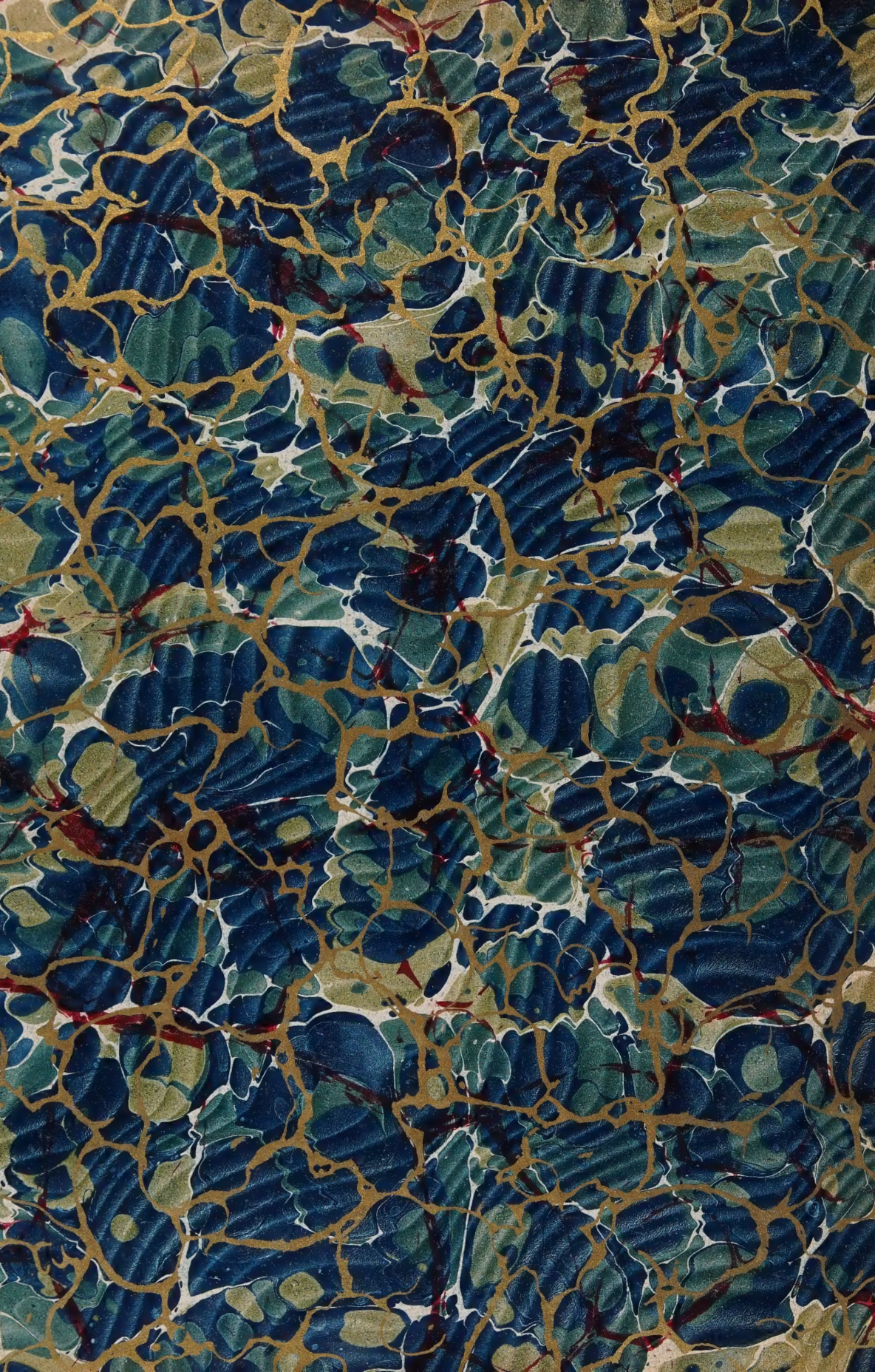


WILLIAM C. TRUL































# Supreme Court,

KINGS COUNTY.

THE BROOKLYN HEIGHTS RAIL-  
ROAD COMPANY,  
Plaintiff,

against

THE BROOKLYN CITY RAILROAD  
COMPANY,  
Defendant.

## PLAINTIFF'S BRIEF.

The complaint herein demands judgment for \$2,000,000, and interest, damages for the defendant's breach of its agreements contained in Article V of the lease, dated February 14, 1893, between the defendant, lessor therein, and the plaintiff, lessee therein, as follows:

"V. The lessor further covenants and agrees to issue three million dollars (\$3,000,000) of its capital stock now unissued, but authorized to be issued, within six months after the delivery of this lease, and to sell and dispose of the same at par, and also to issue three million dollars (\$3,000,000) of its bonds,



now unissued, but authorized to be issued, which said bonds shall be issued from time to time, as requested by said lessee, and shall be sold or disposed of for the highest price bid or offered therefor, and the proceeds of said stock and bonds, less any premium realized or received on the sale of the said bonds shall be expended by the lessor in payment, at the request of the lessee, from time to time of the cost of converting the railroads of the lessor into an electric or into any other kind of railroad authorized by law, which shall be approved of by the lessor and lessee, and if all of such proceeds be not required for such purpose, then any balance shall be expended by the lessor in payment as aforesaid of the cost of such additions, improvements, extensions, branches and equipments to the said railroads and properties of the lessor as in its judgment, and in that of the lessee shall be necessary or advantageous to the property of the lessor or the interest of the lessee, other than those necessary to keep the said railroads and properties in good condition and repair, and other than those necessary to preserve or secure efficiency in the operation of said railroad or railroads, and it is agreed that all expenses incident to the issue, sale and disposition of said stock and bonds shall be borne and paid by said lessee."

This is the lease under which all of the railroads of the defendant, lessor, have been operated by the plaintiff, lessee, since June 6, 1893, the term of the lease being 999 years from that date.

The execution and delivery of the lease is conceded by the pleadings, and the lease is accepted by both parties as the primary foundation on which they base their respective claims in this litigation.

The lease went into effect on June 6, 1893, on which day the defendant delivered to the plaintiff possession and control under and in pursuance of the lease, of all the railroads and railroad property of the defendant, "of whatsoever kind or nature, ex-



cept money, credits and securities," and except the franchise of the defendant to be a corporation.

The defendant had been prosecuting the work of converting its railroads from horse to electric railroads, for about a year prior to June 6, 1893, and the work of conversion was then scarcely more than begun.

The plaintiff continued the work of conversion after June 6, 1893, as by Article XXII of the lease it expressly agreed to do.

The \$3,000,000 of stock and the \$3,000,000 of bonds, specified in the above quoted Article V of the lease as "now unissued, but authorized to be issued", were all yet unissued on June 6, 1893, the date when the lease went into effect, and when possession of the property, demised by the lease, was delivered to the plaintiff, lessee.

The defendant commenced the issuance of said \$3,000,000 of stock in August, 1893, and commenced the issuance of said \$3,000,000 of bonds in November, 1893, and by February 1, 1894, the defendant had issued and sold all of the said stock and bonds, and had realized as "the proceeds of said stock and bonds less any premiums realized or received on the sale of the said bonds," exactly the round sum of \$6,000,000, which is, therefore, the amount which the defendant agreed in and by the above quoted Article V of the lease "shall be expended by the lessor in payment at the request of the lessee from time to time, of the cost of converting the railroads of the lessor into an electric \* \* \* railroad."

The plaintiff continued the work of conversion after June 6th, 1893, and from time to time, presented statements of the cost thereof to the defendant, and the defendant, from time to time, made payments on account thereof, until March 10, 1894, and thereafter refused to make further payments, although up to that date the total amount of such



payments made by the defendant (after crediting certain repayments, did not exceed \$4,259,741.62.

The plaintiff, however, continued the work of conversion after March 10, 1894, until by January 1, 1896, the plaintiff had expended in such conversion work after March 10, 1894, the further amount of.....\$2,237,897.35

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The total cost of conversion work performed after June 6, 1893, therefore, was. . . . . \$6,497,638.97

From time to time after March 10, 1894, the plaintiff requested the defendant to make further payments of the cost of conversion work up to the total agreed amount as aforesaid of .....\$6,000,000.00

But the total amount paid by the defendant on account thereof, as aforesaid, did not exceed. . . . . 4,259,741.62

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The balance. . . . . \$1,740,258.38

with interest, is the amount for which the plaintiff is entitled, under the evidence, to judgment against the defendant.

(a) *The above quoted Article V of the lease, set forth an agreement by the defendant to the effect that the defendant would pay the cost of materials furnished and work performed by the plaintiff after June 6, 1893, in converting the demised railroads from horse to electric railroads, up to the amount of \$6,000,000.*

It is conceded by the pleadings that the lease was executed and acknowledged by the parties thereto, and approved by stockholders owning more than



two-thirds of the stock of the plaintiff, on February 14, 1893, the day on which it bears date; and that it was approved by stockholders owning more than two-thirds of the stock of the defendant on the next day.

The evidence is clear and undisputed, and it is conceded, that the lease was not delivered until April 17, 1893, on which day a contract was entered into between the two companies, which had been theretofore approved by their respective Boards of Directors, authorizing the delivery of the lease on that day, on certain terms and conditions therein stated, and the lease was delivered accordingly, on April 17, 1893.

This delay of slightly more than two months in the delivery of the lease, after its execution, acknowledgment and approval by the stockholders of the parties, was due to the provisions of Article XLVII of the lease as follows:

“XLVII. It is mutually covenanted and agreed between the lessor and lessee that this lease shall not be binding or valid as to either of the parties hereto until approved by the vote of the stockholders of the lessor and lessee as required by law, and that if so approved, this lease shall be delivered to the lessee at such time and upon such terms and conditions as shall be agreed upon by the Boards of Directors of said lessor and lessee, but notwithstanding such approval and delivery, this lease shall not go into effect nor shall the lessee be entitled to enter into possession of the premises and property by this lease demised until said Four million dollars (\$4,000,000) shall have been actually deposited either in cash or in securities, or both, pursuant to the terms of this lease, with said Brooklyn Trust Company, or companies designated by said lessor and lessee, nor until a certificate of said Brooklyn Trust Company or such companies to that effect is endorsed hereon or attached hereto, which cer-



tificate shall be duly executed by said Trust Company or companies under its or their corporate seals, and shall state that said Four million dollars (\$4,000,000), or such portion thereof as they respectively hold is held upon the trust and subject to the terms, covenants and stipulations and conditions in this lease contained with respect thereto."

It was provided in said agreement of April 17, 1893, between the two companies, as well as in the above quoted Article XLVII, that notwithstanding the approval, delivery and acceptance of the lease,

"This lease shall not go into effect, nor shall the lessee be entitled to enter into possession of the premises and property by this lease demised, until said Four million dollars (\$4,000,000) shall have been actually deposited either in cash or in securities, or both, pursuant to the terms of this lease."

It is also clear and undisputed, and substantially conceded by the pleadings, that on June 6, 1893, the plaintiff had fully complied with the terms and conditions of said agreement of April 17, and of Article XLVII of the lease, including the deposit of the \$4,000,000 guaranty fund; and that on the same day, the possession of the property demised by the lease was delivered by the defendant to the plaintiff, thus fixing June 6, 1893, beyond question, as the date on which the lease went into effect.

The draft of the proposed lease, bearing date February 14, 1893, executed and acknowledged on that day by both Companies, and approved by the requisite proportions of stockholders of each Company on February 14 and February 15, respectively, did not then become a contract, but remained merely an executed but undelivered draft of a proposed contract, providing on its face that its delivery was to be postponed indefinitely, and was to be dependent on a contingency which might never

happen, to wit, an agreement between the Boards of Directors of the parties as to the time of such delivery, and as to the terms and conditions on which delivery of the lease should be made.

By the delivery of the lease on April 17, 1893, it then, for the first time, became a contract between the parties, but still it was a mere option to the plaintiff unenforceable by the defendant.

Article XLVII provides that the lease shall not go into effect nor shall the lessee be entitled to enter into possession of the demised property until the \$4,000,000 guaranty fund shall be deposited; and in Article XXXV,

“The lessee further covenants and agrees to deposit or cause to be deposited in the Brooklyn Trust Company, or such company or companies, as trustee, as may be designated by the lessor, on the date of the delivery of this lease, and prior to the date of delivery of possession thereunder the sum of Four mililon dollars (\$4,000,000).”

But the effect of all this merely is that the lessee will not take possession until it has made the deposit and that it will make the deposit before taking possession; but no time is set for either event, and there was no actual agreement either to take possession, or to make the deposit.

Thus this contract of option for a lease, which first became a contract on April 17, 1893, contemplated an indefinite and uncertain period of further delay after April 17, for the exercise of the option on the part of the plaintiff by depositing its \$4,000,000 guaranty fund. On such deposit the contract of option was to be transformed into a contract of mutual rights and obligations, mutually enforceable. But no time was prescribed for the happening of that event, and, in fact, that event did not happen until June 6, 1893. Until that time,



neither party to the lease had any right by virtue of the lease to demand anything from the other.

On June 6, 1893, therefore, the agreements of the defendant contained in the above-quoted Article V of the lease, first became operative, and an absolute obligation, to the effect that the defendant would issue \$3,000,000 of its stock, then unissued but authorized to be issued, before October 17, 1893, and that the defendant would issue \$3,000,000 of its bonds, then unissued but authorized to be issued; "which said bonds shall be issued from time to time as requested by said lessee"; and that "the proceeds of said stock and bonds, less any premium realized or received on the sale of the said bonds, shall be expended by the lessor in payment, at the request of the lessee, from time to time, of the cost of converting the railroads of the lessor into an electric \* \* \* railroad."

The remainder of Article V following the words last above quoted may be dismissed from further consideration, at least on this branch of the case, inasmuch as it is conceded by the pleadings that no other kind of railroad was approved by the lessor and lessee, and that all the proceeds of said stock and bonds were required for the purposes of such conversion, leaving no balance for additions, improvements, extensions, branches or equipments, and that all expenses incident to the issue, sale and disposition of said stock and bonds, were borne and paid by said lessee, leaving the clear net proceeds of said stock and bonds the exact sum of \$6,000,000.

Also on June 6, 1893, the plaintiff first became entitled to request the defendant to issue the \$3,000,000 of its bonds then unissued, but authorized to be issued, and which the defendant had theretofore been under no obligation to issue.

Also, what is of much more importance, the plaintiff was, for the first time, on June 6, 1893, able to place itself in a position where it might become en-

titled to request the lessor to expend the proceeds of the stock and bonds which the defendant had agreed "shall be expended by the lessor in payment at the request of the lessee from time to time of the cost of converting the railroads of the lessor into an electric \* \* \* railroad". The vital point, for the purposes of the present discussion, is not how or when the \$3,000,000 of stock and the \$3,000,000 of bonds were to be issued or sold by the defendant, not how or when the proceeds of the stock and bonds were to be obtained by the defendant, but the vital point is, how and when the \$6,000,000 proceeds of the stock and bonds were to be expended by the defendant; and, on this point, Article V is express and clear that such proceeds were to be expended at the request of the lessee from time to time, in payment of the cost of converting the railroads into an electric railroad.

A request from the plaintiff before June 6, 1893, either that the defendant should issue the bonds, or should expend the proceeds of the stock and bonds, if any such proceeds had existed before that date, would have been a nullity. Until June 6, 1893, the railroads were exclusively in the possession and under the control of the defendant, and so far as the provisions of the lease were concerned, the defendant could proceed with the work of conversion or not as it pleased. Before that date the plaintiff could take no part in the work of conversion, and had no power to make the defendant liable for any expense the plaintiff might have incurred by participation in the work of conversion, even if such participation by the plaintiff had been possible before June 6, 1893. But on and after June 6, 1893, the railroads were exclusively in the possession and under the control of the plaintiff. By Article XXII of the lease the plaintiff had agreed to proceed faithfully and diligently with the work of converting



the railroads into an electric railroad. The plaintiff could not proceed with such work until June 6, 1893, and it was not until after the plaintiff had actually entered upon the work of conversion, and had made some expenditure therein or incurred some liability therefor, that the plaintiff could be entitled to request from the defendant the first payment from the proceeds of the stock and bonds; and that was the time fixed and prescribed by Article V of the lease for the first payment by the defendant of the proceeds of the stock and bonds; and by Article V such payments were thereafter to continue until the entire \$6,000,000 proceeds of stock and bonds should be paid by the defendant, if requested by the plaintiff in accordance with the conditions prescribed in Article V.

There is no indication or suggestion in Article V of the lease that in case of delay in the delivery or taking effect of the lease, or for any other reason, any portion of the proceeds of such stock and bonds should be applied by the defendant lessor, on its own motion, in payment of any portion of the cost of the work of conversion, which should be performed by the lessor prior to the delivery of the lease, or prior to the taking effect of the lease, or prior to the delivery of the demised property to the plaintiff and no such proceeds had come into existence prior to June 6, 1893; but Article V expressly states that the proceeds of both the stock and the bonds realized from the issue thereof, "shall be expended by the lessor in payment *at the request of the lessee*, from time to time, of the cost of converting the railroads of the lessor into an electric \* \* \* railroad."

(b) *The agreement thus set forth in Article V is recognized and confirmed by the other provisions of the lease relating to the same general subject matter.*

"The date when this lease shall take effect" is made the "cut-off" date for substantially all the purposes of the lease.

Thus Article I (last clause) of the lease, and Article XIV make the term of the lease "999 years from the date this lease shall take effect."

Article X provides that the lessor shall "transfer and deliver to the lessee *at the date this lease shall take effect* all supplies and materials *then* on hand," on payment by the lessee of the cost price thereof; and corresponding provision is made in Article XXIV that, on the termination of the lease, the lessee will transfer and deliver to the lessor, all materials and supplies then on hand on payment of the cost price therefor by the lessor; and Article XXVII provides that on the termination of the lease, the lessee will return the demised properties to the lessor "in as good order, condition and repair, as they were *at the date this lease takes effect*."

Article VIII provides that the lessee may "collect for its own use, all rent falling due *subsequent to the date this lease takes effect* under or by virtue of any lease, contract or agreement except this lease, between the lessor and any person or corporation \* \* \* , and the lessee agrees to account and pay over to the lessor so much of the said rent, as shall have accrued *prior to the said date*;" and Article XIII authorizes the lessee to sue "for the collection of any rent payable or falling due to the lessor as aforesaid, *subsequent to the date this lease shall take effect*."

Article XVII provides that the lessee shall "pay all rentals accruing *after the date this lease takes effect* under the terms of any contract or agreement or lease then existing between the lessor and any person or corporation."

Article XXIV provides that the lessee shall indemnify and save harmless the lessor "from the ex-



pense of the defense of all actions which shall be pending against the lessor *on the date this lease takes effect*, or which may hereafter during the said term of the continuance of this lease, be brought against the lessor for injuries," or for damages resulting from death "on account of negligence in the maintenance or operation of said railroad, and from and against any judgment existing against the lessor upon like cause of action *on the date this lease takes effect*, or at any time thereafter during the continuance of this lease;" and makes corresponding provision that payments made by the lessee under such indemnity clause, may be deducted from corresponding negligence claims existing at the time of the termination of the lease, the amount so deducted to be paid by the lessor and the balance only to be paid by the lessee on the termination of the lease.

*Article IV provides for the payment by the lessor of all the indebtedness, obligations and liabilities of the lessor, "other than its bonded indebtedness, and its liabilities assumed by the lessee," as of the date when this lease shall take effect, "and also the said pro rata amount of accrued interest from its said bonded indebtedness and of its rentals, and shall pay over to the lessee upon demand the said pro rata amount of taxes for the current year estimated as aforesaid."*

Inasmuch as the only liabilities of the lessor assumed by the lessee besides the apportionment of interest and taxes as of June 6, 1893, are those above specified as provided for in Articles XVII and XXIV of the lease, to wit, (XVII), rentals accruing after the lease takes effect, under the terms of any contract agreement or lease then existing between the lessor and any other person or corporation, and (XXIV), judgments then existing, and actions then pending or thereafter brought against the lessor for negligence; it necessarily follows that

the lessor under Article IV of the lease agrees to pay all liabilities which should be incurred by the lessor, in the work of conversion, before the lease should take effect and while the lessor should be in exclusive possession of the railroads. Payment of its own liabilities, incurred for conversion expenditures made before June 6, 1893, and remaining unpaid on that date, which the defendant in and by Article IV, thus agrees to pay, as well as payments actually made, before June 6, of its liabilities incurred for conversion expenditures made before that date, could not be deemed to be referred to as payments to be made at the request of the lessee, but, instead, such payments were payments by the lessor of its own direct liabilities, made on its own motion, for expenditures which it owed the lessee no obligation to make, and which it would be wholly irrelevant for the lessee to request the lessor to pay, and which the lessor by Article IV had expressly agreed to pay; and the property thus paid for by the lessor became at once the lessor's property in its possession, and a part of the property to be demised by the lease, and was in fact a part of the property delivered over to the lessee on June 6, 1893.

Article IV of the lease further provides that the "moneys, credits and securities on hand at the date the lease shall take effect," less certain deductions therein specified, should also be used, applied and expended by the lessor in payment "at the request of the lessee from time to time of the cost of converting the railroads of the lessor into an electric railroad or into any other kind of railroad authorized by law which shall be approved by the lessor and lessee," or, if not required for such purpose, should be expended in the payment "as aforesaid of the cost of additions, improvements, extensions, branches and equipments of the said railroads and properties of the lessor."



Inasmuch as it appears from the evidence that the "moneys, credits and securities" then on hand (not including, of course, the \$3,000,000 of stock and \$3,000,000 of bonds then unissued, but authorized to be issued, and therefore in no sense constituting moneys, credits or securities), did not exceed the deductions thus to be made therefrom, there was no balance from this source to be expended in payment of the cost of conversion.

The inevitable conclusion from construing together these provisions of Article V and Article IV, is that the defendant agreed that the proceeds of the \$3,000,000 of stock and the \$3,000,000 of bonds should be expended in payment, at the request of the lessee, from time to time, of the cost of the conversion work which should be performed by the lessee after the lease should take effect.

That such was the agreement made and intended to be made by the parties to the lease is further confirmed by still other provisions of the lease in which the proceeds of the \$3,000,000 of stock and \$3,000,000 of the bonds are referred to.

Besides the fund to be constituted by the proceeds of the said stock and bonds, which the lease thus provided should absolutely and certainly be available to the lessee for the work of conversion after the lease should take effect, and for additions, improvements, extensions, branches and equipments in case of a surplus after conversion should be completed, the lease provided contingently and conditionally for two other sources from which the lessee might obtain still further funds for prosecuting the work of conversion, and in case such funds should be more than sufficient for conversion expenditures, then for additions, improvements, extensions, branches and equipments.

One of these two contingent sources of funds for such purposes, was the proceeds of sales of real estate as set out in Article XLV of the lease, which

provides that if the continued use of any real estate demised should not be necessary for the maintenance or operation of the railroads, then the lessor with the consent of the lessee, might sell and dispose of said real estate, and the proceeds realized therefrom should be expended by the lessor "for the same purposes as in this lease provided for the expenditure of the proceeds of the stock and bonds of the lessor."

The other of these two contingent sources of funds, for such purposes, was "monies, credits and securities on hand at the date this lease takes effect," after certain deductions should be made therefrom, as specified in Article IV, hereinbefore referred to.

Expenditures made by the lessee for conversion, or for additions, improvements, extensions, branches and equipments not payable from either of these three funds, are referred to in various provisions of the lease as expenditures made by the lessee "out of its own funds", and the lease carefully provides that the additions, improvements, extensions, branches and equipments made by the lessee which are payable out of any of the three funds furnished by the lessee as aforesaid, should, on the termination of the lease, be returned to the lessor without any payment by the lessor therefor; whereas all such improvements, extensions, branches and equipments made by the lessee "out of its own funds" are to be turned over to the lessor on the termination of the lease, on payment by the lessor of the cost price thereof.

Thus the lease contemplated that two entirely distinct sets of claims would arise in favor of the lessee against the lessor. One set of claims was to be the cost of the lessee's expenditures for conversion, additions, improvements, extensions, branches and equipments for which the said three funds were to be available, and claims thus arising were to be



paid by the lessor forthwith, out of such three funds until such funds should be exhausted, and at the termination of the lease such improvements, additions, extensions, branches and equipments were to be surrendered to the lessor without further payment therefor. The other set of claims was to be for the cost of additions, improvements, extensions, branches and equipments constructed, made or furnished by the lessee "out of its own funds", the cost of which was to be paid by the lessor on the termination of the lease.

Moreover, Article XXI of the lease provided that the lessee "shall not have the right to and will not make or construct any extensions, additions, branches and improvements, or furnish any equipments \* \* \* to be paid for out of its own funds, other than such as should be necessary to keep the railroads and properties in good condition \* \* \* until after the said unissued stock and bonds of the lessor shall have been issued, and the proceeds realized upon the sale of said stock and bonds shall have been expended as in this lease provided."

The long description of the property demised in Article I of the lease closes as follows:

"And all other property of whatsoever kind or nature except money, credits and securities acquired, owned or possessed by said lessor for use in the construction, maintenance or operation of said demised railroad or railroads and properties, or any extension or branch thereof, or which may hereafter be acquired by said lessor for such use."

The provisions of the lease, above referred to, as relating to the same general subject, and therefore to be construed together, are here quoted in full as follows (Articles V and XLVII having been already quoted in full at pp. 1 and 5 of this brief):

"IV. The lessor further covenants and agrees that all moneys, credits or securities on

hand at the date this lease shall take effect, less the amount required to pay and discharge the indebtedness, obligations and liabilities of the lessor as of that date other than its bonded indebtedness upon bonds issued or assumed by it, and less the amount of its surplus earnings diminished by a pro rata amount of accrued interest and accrued rentals agreed to be paid by the lessor and a pro rata amount of taxes for the current year estimated upon the amount of the taxes for the preceding year, shall be used, applied and expended by the lessor in payment, at the request of the lessee, from time to time, of the cost of converting the railroads of the lessor into an electric railroad, or into any other kind of railroad authorized by law, which shall be approved of by the lessor and lessee, and if said moneys, credits and securities be not required for such purpose, then they shall be expended in the payment as aforesaid of the cost of additions, improvements, extensions, branches and equipments of the said railroads and properties of the lessor, other than those necessary to keep said railroads and properties in good condition and repair and other than those necessary to preserve or secure efficiency in the operation of said railroad or railroads. Provided, however, that the lessor shall pay and discharge its said indebtedness other than its bonded indebtedness and its liabilities assumed by the lessee, as of the date when this lease shall take effect, and also the said pro rata amount of accrued interest upon its said bonded indebtedness and of its rentals, and shall pay over to the lessee upon demand the said pro rata amount of taxes for the current year estimated as aforesaid."

"XXII. The lessee further covenants and agrees that it will proceed faithfully and diligently with the work of converting the said railroad and railroads into an electric railroad, or into such other kind of railroad as shall be approved by the lessor and lessee; and that in the event that the said moneys belonging to the lessor on hand at the date this lease takes ef-

fect, after the deductions aforesaid and the proceeds of said stock and bonds of said lessor authorized to be issued, but unissued, shall be insufficient to pay and discharge the cost of converting the said railroad and railroads of the lessor into an electric railroad, or into such other kind of railroad as may be agreed upon by the lessor and lessee, that then and in that event the lessee will forthwith furnish and supply all such sums of money, materials and supplies as may be requisite and necessary for that purpose, and will proceed faithfully and diligently with the work of constructing and converting said railroad and railroads into an electric railroad or such other kind of railroad as may be agreed upon by the lessor and lessee."

"XLV. It is mutually covenanted and agreed between the lessor and lessee that if the continued use of any real estate included in or covered by the terms of this lease shall not be necessary or required for the maintenance or operation of said railroad or railroads, extensions or branches, then in that event the lessor, with the consent in writing of the lessee, may sell and dispose of said real estate, and the proceeds realized therefrom shall be expended by the lessor for the same purposes as in this lease provided for the expenditure of the proceeds of the stock and bonds of the lessor."

"X. The lessor further covenants and agrees that in the event of the expiration of this lease, or other sooner termination thereof, it will pay to the lessee the actual cost of all property, extension, branches, additions, improvements and equipments, made, acquired and paid for by said lessee out of its own funds for use in connection with the operations of the railroads of the lessor, less the cost of such part thereof as was required to preserve said railroads, extensions, additions, improvements and equipments in good repair and serviceable condition, and less the cost of such part thereof as was necessary to preserve and secure efficiency in the operation of said railroad."



"XXIII. The lessee further covenants and agrees that at the expiration of this lease, or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the lessee out of its own funds to the said railroad or railroads or property shall be and become the property of the lessor upon the payment by the lessor of the cost thereof, as in this lease provided."

"XXV. The lessee further covenants and agrees at the expiration or any sooner termination of this lease, to surrender to the lessor all property, additions, improvements and equipments which shall be furnished, constructed or completed out of the proceeds of the stock or bonds of the lessor, or moneys advanced by the lessor subsequent to the delivery of this lease, or from the proceeds of sales of property of the lessor, equal in value and in as good condition as when so furnished, constructed and completed, reasonable wear and tear excepted."

"XXI. The lessee further covenants and agrees that it shall not have the right to and will not make or construct any extensions, additions, branches and improvements, or furnish any equipments to the said railroad and railroads and properties by this lease demised to be paid for out of its own funds other than such as shall be necessary to keep said railroads and properties in good condition and repair, and to preserve efficiency in the operation of said railroad until after the said unissued stock and bonds of the lessor shall have been issued and the proceeds realized upon the sale of said stock and bonds shall have been expended as in this lease provided, and that it will not construct or apply for the right to construct any extension or branch of said railroad or railroads without first obtaining the consent in writing of the lessor thereto."

The foregoing review of the leading provisions of the lease, material to the questions raised by

this litigation, shows that June 6, 1893, was the "cut-off" date, for beginning the conversion work, which was to be paid for out of the \$6,000,000 proceeds of said stock and bonds, as well as for apportioning between the parties, current fixed charges such as interest, taxes, rentals payable or receivable under sub-leases, and negligence liabilities; that the plaintiff agreed after said date to prosecute diligently and faithfully the work of conversion and to first exhaust the three funds to be supplied by the lessor in payment therefor and for additions, improvements, extensions, branches and equipments, before making expenditures for either of such purposes "out of its own funds"; and, at the termination of the lease, the additional improvements, extensions, branches and equipments, paid for out of either of said three funds provided by the lessor, were to be surrendered back to the lessor without further payment by the lessor; but such as should be paid for by the lessee "out of its own funds" were to be surrendered to the lessor, at the termination of the lease, on payment by the lessor to the lessee of the cost thereof; and that the entire \$6,000,000 net proceeds of said \$3,000,000 of stock and \$3,000,000 of bonds were to be expended by the lessor after June 6, 1893, in payment at the request of the lessee from time to time of the cost of conversion work to be performed by the lessee after June 6, 1893.

## PART I.

### POINTS.

#### I.

**The total amount of the payments made by defendant of the cost of labor performed and materials furnished after June 6, 1893, for which defendant was entitled to credit in reduction of its obligation under Article V to expend the proceeds of the stock and bonds**

<b>amounting to . . . . .</b>	<b>\$6,000,000.00</b>
<b>did not exceed . . . . .</b>	<b>4,259,741.62</b>

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**leaving a balance of . . . . \$1,740,258.38 which the defendant still remains under obligation to pay to the plaintiff as provided by Article V.**

Although Article V of the lease provided that the proceeds of the stock and bonds should be expended by the lessor in payment of the cost of converting the railroads of the lessor into an electric railroad; and that only the surplus, if any remaining after the completion of conversion should be expended in payment of the cost of additions, improvements, extensions, branches and equipments; nevertheless, throughout this litigation, such prescribed order of expenditure, as between conversion and other construction, has been ignored; and both parties have assumed, for the purposes of this litigation, that payments made by the defendant of the cost of labor



performed and materials furnished after June 6, 1893, whether for conversion proper or for other construction, are properly credited in reduction of the obligation of the defendant to expend the \$6,000,000 as provided in Article V.

The evidence of such payments by the defendant is necessarily limited, almost exclusively, to the books and vouchers of the defendant. No separate account of its expenditures of the \$5,000,000 fund was ever opened or kept by the defendant.

The defendant's charges to conversion and construction, as shown in its ledger, followed substantially the same general classification that had been adopted at the beginning of the defendant's operations in 1853. There were three main construction accounts, entitled, "Construction," "Real Estate" and "Equipment." To this was added, during the process of conversion, an account entitled, "Extraordinary Expenditures on Account of Electricity"; but the significance or purpose of this account has never been satisfactorily explained, as it only purported to cover a few of the expenditures for conversion, and not to cover conversion expenditures generally.

After June 6, 1893, a new ledger account was opened by the defendant entitled "Brooklyn Heights R. R." This account contained, on one side, cash advances made directly by the lessor to the lessee; also a certain portion of proceeds realized by the lessee from its sales of old material and supplies; also the inventory of materials and supplies on hand June 6, 1893, amounting to \$251,335.19; and some other items. On the other side of this account was shown the classification of the expenditure of these advances between the various construction and operation accounts, as distributed by the lessor from the statements presented by the lessee. But this account did not contain, on either side, the pay-

ments which were made by the lessor of payrolls of employees of the lessee engaged after June 6, 1893, in conversion and construction work. This account does not purport on its face to have any relation to the \$6,000,000 fund, although to the extent that the advances therein entered were used for conversion and construction they may be considered as payments on account of the obligation to expend \$6,000,000. The account itself, however, shows that part of these advances were applied in repaying the lessee for operating expenses of the lessor incurred prior to June 6, 1893, and other like obligations of the lessor, which the lessee had temporarily paid, and rendered statements thereof to the lessor.

It will thus be seen that nowhere, in the books and accounts of the lessor, was it possible at any time to find any separate and distinct account showing payments by the lessor on account of its obligation to expend the \$6,000,000 after June 6, 1893, for conversion and construction at the request of the lessee. Any attempt to discover what expenditures were actually made in the discharge of this obligation involves an analysis of all the defendant's expenditures for all purposes after June 6, 1893, and a determination of what portion of such expenditures was for labor performed and materials furnished after June 6, 1893, in the work of conversion and construction, and what portion represented cash advances made to the lessee for construction and conversion purposes. By reason of the comparatively few transactions of the defendant after June 6, 1893, the inquiry into these matters is not difficult and there is no opportunity for any great difference in the determination of the figures. The defendant's bill of particulars, as subsequently modified in comparatively small respects by the defendant's evidence, and other evidence of

both parties, shows that the cash advances to the plaintiff were as follows:

For construction payrolls . . . . .	\$1,084,435.58
For other purposes . . . . .	3,213,049.43

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Total cash advances . . . . .	\$4,297,485.01
There was also credited the inventory value of supplies on hand June 6, 1893, namely . . . . .	251,335.09

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Making the total of cash advances and credit by inventory . . . . .	\$4,548,820.60
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Of these advances the plaintiff has proved that amounts aggregating \$42,532.84 represented repayment to the lessee of various operating expenses of the lessor paid temporarily by the lessee, of which the lessee rendered statements to the lessor; and, in addition, the lessee subsequently repaid to the lessor, under the terms of the tripartite agreement (reference to which is made below) \$308,340.35, together with interest amounting to \$16,136.46. These three amounts aggregating \$367,009.65 deducted from the total of the cash advances above stated, leaves the net cash advances \$4,181,810.95.

In addition there was paid and charged directly by the defendant after June 6, 1893, on account of conversion and construction, the sum of \$328,416.10 (see stipulation, page 394), of which amount the defendant concedes (see same stipulation) that \$82,523.70 represented materials furnished and labor performed prior to June 6, 1893, and the plaintiff has proved that \$189,381.36 additional was for materials furnished and labor performed prior to June 6, 1893, leaving \$56,511.04 representing direct payments by the defendant after June 6, 1893, on account of its obligation to expend \$6,000,000.



The defendant also includes in its bill of particulars under cash advances to the plaintiff, two sums, namely, \$4,102.48 and \$1,891.40. Of these, the latter has been proved to represent materials furnished and labor performed prior to June 6, 1893, and of the former, \$357.00 has been similarly proved. Out of these two amounts, therefore, aggregating \$5,993.88 there should be deducted \$1,891.40 and \$357.00 (together \$2,248.40), leaving \$3,745.48 to be added to the amounts expended directly by the defendant after June 6, 1893, on account of the plaintiff.

In addition the defendant paid the General Electric Company on July 8, 1893, \$50,000 and on August 21, 1893, \$30,000 for generators which were charged to Supplies. But afterward, by journal entry under date of February 28, 1894, these payments were transferred to construction. The plaintiff has proved that these two amounts, together with \$30,000 charged directly to construction on February 15, 1893, represented the purchase of generators contracted for on April 21, 1892, and that the shipments on this account prior to June 6, 1893, amounted to \$96,457.90. The plaintiff admits, therefore, that the difference between the amount paid, namely, \$110,000 and the amount for which the defendant was liable on June 6, 1893, namely, \$96,457.90—such difference being the sum of \$13,542.10—was a proper charge against the \$6,000,000, and this amount should be added to the direct payments after June 6, 1893.

The plaintiff also admits that a portion of the charge to construction, by journal entry covering interest on loans made after June 6, 1893, for construction purposes in anticipation of the sale of stock and bonds, namely, \$4,132.05, was a proper charge against the \$6,000,000.

We have, therefore, the following summary of the expenditures by the defendant after June 6,

1893, which are proper credits against its obligation to expend \$6,000,000 on account of the plaintiff, to wit:

Net cash advances. . . . .	\$4,181,810.95
Direct payments (\$56,511.04 and \$3,- 745.48 as above). . . . .	60,256.52
Proper portion of journal entry account of generators. . . . .	13,542.10
Proper portion of journal entry on account of interest. . . . .	4,132.05
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Total. . . . .	\$4,259,741.62

leaving a balance of \$1,740,258.38 as the amount by which the defendant failed to fulfill its obligations.

The plaintiff submits that these figures are substantially unassailable, and with the exception of a few small items are undebatable. The defendant has not been able to show, in any figures which have been introduced in evidence, that the amount of its net cash advances and direct payments on account of materials furnished and labor performed after June 6, 1893, exceeds the sum of \$4,259,741.62.

Some small additional amounts were paid over by the defendant to the plaintiff but these were clearly not chargeable against the \$6,000,000 because they were proceeds from the sales of real estate which the defendant by Article XLV of the lease was obliged to turn over to the plaintiff or expend for the benefit of the plaintiff.

The defendant does seek, however, to increase the amount which it claims it has expended on account of its obligations by, in effect, charging against the \$6,000,000 certain amounts representing mostly not actual expenditures after June 6, 1893, and in some cases representing no expenditures whatever, but charges made by journal entry on or after September 30, 1893, of various sums aggregating \$628,066.28.

These journal entries are all recited in the defendant's bill of particulars as charges against the \$6,000,000 fund and are set forth repeatedly in the evidence submitted by both parties to this action. There is no dispute about the figures or the dates of entry. There is no dispute as to the period in which the transactions covered by the entries took place. Stripped of all accounting technicalities, their effect was artificially and fictitiously to enlarge either the book surplus of the defendant or its construction account or both, and, in either case, under the defendant's theory to increase the amount to be credited the defendant in reduction or discharge of its obligation to expend the \$6,000,000. Whatever justification there might have been for these entries from the standpoint of the lessor Company alone, they were grossly improper, fictitious and fraudulent to the extent that they deprived the lessee Company of the expenditure which the lessor had agreed to make on the demised property after June 6, 1893, and to which the lessee was entitled by the terms of the lease. From either an accounting or business point of view they were evidences of that frenzied financing which conservative men have learned to condemn, and to the extent that they impaired a contractual obligation were a betrayal of trust and a fraud upon the victim.

These journal entries are so important, are so wrongful in their effect upon the lessee, are so significant of the selfish motives inciting the lessor, and are so opposed to sound and honest methods that a detailed reference to them is essential to the proper understanding of the issues involved in this action. They are as follows

1. The entry pursuant to the resolution of the Board of Directors of the defendant on September 28, 1893, charging construction account and crediting surplus account with the amount of a dividend of \$90,000 paid on the stock of the company on Jan-



uary 3, 1893, before the lease was even proposed to the stockholders of either company. This entry was explained by the resolution of the Executive Committee of the defendant (p. 177) as being made because the stock upon which the dividend was declared on January 3, 1893, "was issued expressly for the purpose of securing money to construct the road". It is a novel idea that after capital is procured by the issue of stock at par and after dividends have been declared upon such capital out of surplus earnings, then accrued, the amount of such dividends should thereafter be charged to construction and the apparent surplus restored by putting the amount back into surplus account. The intent of this entry as admitted by Lewis (p. 3358) was to deduct \$90,000 from the gross total going to the plaintiff. Fosdick, the defendant's expert accountant, says (p. 7323) that the \$90,000 was part of a dividend which was declared on stock not earning any dividend. In other words, if a dividend is paid on capital which has not earned a dividend the dividend should be charged to construction.

2. The entries authorized on the same date charging to construction and crediting to surplus \$24,000 purporting to be the fares of employees engaged in construction. The period covered by these fares was between July 1, 1892, and June 6, 1893. The amount was purely an arbitrary one, apparently based on no statistical information, justifiable only if it represented the tickets used by employees engaged in construction when transported by the company.

The plaintiff showed by the evidence of Throckmorton (pp. 1967-8) and of Hourigan, its accountant (p. 2091), that, after August, 1893, a separate account was kept by the plaintiff of construction tickets and operation tickets issued to employees, and that if the employees' tickets used in the fiscal year commencing July 1, 1892, were calculated on

the same proportion to employees' payrolls as the actual proportion between employees' tickets from October 1, 1893, to July 1, 1894, and payrolls for that period, the number of employees' tickets for construction purposes from February 14, 1893, to June 6, 1893, would have amounted to \$1,635.60. This demonstrates that the charge of \$24,000 was made without any knowledge of the actual amount which might justly have been transferred from operation to construction on account of employees' transportation. But whatever amount was transferred could not and did not apply to the period after June 6, 1893, and no part of the \$24,000 was, therefore, properly chargeable against the \$6,000,000. Even as a charge against the defendant's own construction account the amount was grossly excessive.

3. Entries aggregating \$82,391, \$28,206.03 and \$27,200 (a total of \$137,797.03) representing charges to construction and credits to operation (thereby proportionately increasing surplus). The defendant's justification of these entries (pp. 7070-3) was that it was customary at the end of the fiscal year to go over the operation charges and to transfer to construction such portion of those charges as really represented material furnished or labor performed in construction so that the various payments for officers and clerks, office rent, light, legal expenses, advertising, horses, horse shoeing, provender, work on equipment, etc., which might be construed as having been for construction purposes were transferred to capital account. While theoretically this might be true, clearly none of such charges could be credited to the obligation of the defendant toward the plaintiff, inasmuch as all operating expenses of the defendant ceased after June 5, 1893, and there was, therefore, no proportion chargeable to construction. Moreover, even as affects conservative bookkeeping on the part of the

defendant, irrespective of its relations to the plaintiff, the charges thus made were, as is shown in detail further on, grossly excessive, and in some instances duplicated similar charges made from month to month as the expense was incurred. Clearly they were purely an estimate and were based on no tangible reports or information.

4. Entries aggregating \$53,724.94 constituting transfers from interest account to construction, all of which, with the exception of \$4,132.05, were not proper charges against the \$6,000,000. They consisted of several items of which one, namely, \$27,619.67, was interest on construction loans prior to January 31, 1893. The remainder covered interest on loans after June 6, 1893. The defendant attempts to justify this interest charge to construction after June 6, 1893, although the amounts had been primarily charged to operation, by assuming that the loans were made on account of construction. It is true that the defendant borrowed money during the summer of 1893 prior to the sale of its stock and bonds. It is also true that the interest on such loans might be a legitimate charge to construction if the accounts were honestly kept. The plaintiff's accountant, however (pp. 2252-5), computed the interest upon the payments made by the defendant to the plaintiff out of the \$6,000,000, commencing with June 6, 1893, down to the time when the proceeds received by the defendant from the stock and bonds exceeded the advances, and the total interest actually chargeable upon such advances amounted to \$4,132.05. Thereafter the proceeds of stock and bonds received exceeded the disbursements thereof, and although the plaintiff paid interest and dividends as rental on the stock and bonds from which these proceeds were realized, the defendant received interest on these bank balances, and, if computed only at 3%, would be four or five times the amount actually due the defendant for in-



interest on loans contracted by the defendant prior to the time that the receipts from the stock and bonds exceeded the advances to the plaintiff. Yet we find that the defendant (Exhibit 1458, Schedule 5) transferred to its surplus account all interest on daily balances amounting to \$4,903.42, notwithstanding the fact that the plaintiff was paying interest on the securities from which these moneys were received. All of these transfers, therefore, from interest account to construction account were improper charges against the obligation of the defendant toward the plaintiff, with the exception of the \$4,132.05 above mentioned.

5. Entries crediting supplies and charging construction with the balance of supply account. These entries are clearly forced in order that a balance remaining on the defendant's books, but not represented by any actual property, might be converted into cash. As to the facts connected with these entries, there is no dispute. Their artificial character is apparent on their face. The situation briefly was as follows:

The defendant's custom was not to enter on its books the cost of materials purchased until the day when the bill was paid. At that time the amount would be charged into what was called "Supply Account". At the end of each month the storekeeper, or other person in charge of supplies, sent in to the secretary of the Company a report, in which he stated the amount in dollars and cents of supplies consumed during that month, and the purpose for which they were used, namely, construction or operation. The supply account was started on July 1, 1890, based then upon actual inventory. No other inventory was taken until June 6, 1893, and then pursuant to the terms of the lease. From July 1, 1890, therefore, the supply account was added to from time to time by the amount of bills paid for supplies, and was credited from time to time with

the supplies used in construction or operation. The supplies on hand June 6, 1893, as inventoried, were turned over to the plaintiff and paid for by the plaintiff. The defendant had no supplies after that date. Its debit balance in this account on May 31, 1893, immediately prior to the taking effect of the lease, was \$187,144.68.

From that time on the defendant was in receipt of bills for supplies which had been received prior to June 6, 1893, and had been turned over, as required by the lease to the plaintiff, and paid such bills, charging the supply account therewith, until on September 30, 1893, the debit balance in this account had grown to \$607,280.22, although there were no supplies on hand belonging to the defendant. There was properly credited to this amount the inventory value of the supplies turned over to the plaintiff on June 6, 1893, namely, \$251,335.59, leaving a debit balance of \$335,944.63, which was increased by sundry additional charges of the same character as those making up the remainder of the account, so that on January 31, 1894, the debit balance was \$365,020.95, with no supplies on hand.

Here, indeed, was a dilemma. Supplies gone, money gone, only the debit balance left. But the defendant was equal to the occasion. The only way in which it could get rid of this debit balance was to saddle it upon other accounts. By journal entry on January 31, 1894, it charged real estate and credited supplies with payments made to the General Electric Company for generators in July and August, 1893, which at the time of payment were charged to supplies. This transfer has been previously referred to and all of it was undoubtedly proper so far as the defendant's own construction account was concerned, but, as previously set forth, only \$13,542.10 was a proper charge against the obligation to expend \$6,000,000. This entry reduced the supply account debit balance to \$285,020.95, and on the same date the entire balance was

transferred to a suspense account, and later from suspense account to construction. The explanation of the entry, in the books, was as follows:

"To suspense account, \$285,020.95; to supplies, \$285,020.95; for difference in amount of supplies on hand as per ledger and as per inventory pending adjustment with Brooklyn Heights Railroad Company."

When the suspense account was later transferred to construction, the following entries were made:

"Equipment, \$150,245.79; to suspense account, \$150,245.79; for payments made General Electric Company for motors received and charged to supply account which were not charged to equipment until mounted (see inventory)."

"Construction, \$134,775.16; to suspense account, \$134,775.16; for sundry items paid for and charged to supplies, but used on account of construction; above entries on this folio made by direction W. A. H. Bogardus, Secretary and Treasurer, 1893."

These two entries exactly balance the supply account. No explanation or papers could be found anywhere justifying these two entries, the effect of which was to increase the construction account of the defendant and to permit it (under this theory) to deduct from the \$6,000,000 fund this entire balance of the supply account. The action had not, as in the case of most of the other journal entries, been referred to or the subject of resolution in the meetings of the Executive Committee or Board of Directors.

As to the item of \$150,245.79 for motors received and charged to supply account, the defendant has attempted to justify this item by referring to an item of similar amount contained in the inventory of equipment on hand June 6, 1893, being a list of the property turned over to the plaintiff. While included in the inventory it was not included



in the \$251,335.59, for which the plaintiff was to pay, under the lease, but was part of the equipment turned over by the lessor and separately enumerated in other schedules of the inventory. Whether paid for by the defendant before or after June 6, 1893, the cost of the motors was an obligation of the defendant on that date, which, under Article IV of the lease, it was obliged to pay out of its moneys, credits and securities on hand.

The defendant has attempted by its expert accountant to justify the entry by various ingenious arrangements of figures, all of which reflect another persistent effort to force a balance, but which even if accepted, do not justify the defendant in charging this amount against the \$6,000,000 obligation.

As to the remainder of the supply account represented by the transfer of \$134,775.16, to construction, apparently no explanation or justification is given. The supplies in question were concededly not on hand. The balance represented the residuum of the supply account with its debits and credits from July 1, 1890. The supplies represented by this amount might have been lost, stolen or used either in operation or construction, without report having been made therefore by the storekeeper. There is absolutely no way of identifying this amount with any particular supplies. There is absolutely no way by which the supplies represented by this amount may be traced. This balance of account was in effect a deficiency, and should have been charged to profit and loss. Under no proper scheme of bookkeeping was there any justification for charging this balance to construction, and least of all, was there any justification for including it as one of the payments authorized out of the \$6,000,000. Yet there it stands on the books, undisputedly charged against capital, and included in the enumeration of payments which the defendant asserts it has made on account of its obligation to

expend after June 6, 1893, \$6,000,000 in the conversion of its railroads.

6. The entry of \$41,655.41 charged to The Brooklyn Heights Railroad Company under date of August 15, 1894, reading as follows:

“For interest at 6% per annum from June 6, 1893, to August 15, 1894, \$582,594.59; surplus account under tripartite agreement, \$41,655.41.”

This is a direct charge against the plaintiff and in effect was deducted from the proceeds of the sales of stock and bonds which were to be expended by the lessor at the request of the lessee. This entry is so significant of the distorted view which the defendant had of the terms of the lease, or of the extent to which it was willing to depart from its obligation under the lease, and is so closely related to other transactions connected with the so-called tripartite agreement of August 15, 1894, that a thorough analysis of the statement upon which the entry was based and of the situation leading to it is essential to a complete understanding and is given further on in this brief. It is sufficient to say here that the entire scheme, of which this entry was a part, shows an attempt, a year and two months after the lease took effect, to fictitiously exaggerate what the book surplus of the company actually was on June 6, 1893, and to charge the plaintiff with interest upon such exaggerated book surplus, apparently upon the theory that the plaintiff had had the use of the alleged surplus, whereas in fact the plaintiff had had no use thereof, the surplus itself was largely fictitious, and under no theory of the lease had the surplus any relation to the expenditure of the \$6,000,000 fund, except upon the mistaken theory that the \$3,000,000 of stock and the \$3,000,000 of bonds were part of the “moneys, credits and securities” on hand on June 6, 1893, and that

therefore the defendant had the right to take its surplus out of this \$6,000,000 fund, and not having previously done so, it then proceeded to do, together with interest.

Although the entry itself speaks of this surplus of \$582,594.59 as "surplus account under tripartite agreement," there is not a mention in the tripartite agreement of either the surplus or the amount in question. There is not a single part of the books or vouchers of the defendant which indicates the figures mentioned, and the whole fraudulent entry is based on a weird and confusing statement contained in the famous "yellow sheet" frequently referred to in the evidence, a repeated study of which is essential for the purpose of understanding what it is intended to accomplish, and the principal impression on studying which is the desperate extremity to which the lessor's accountants were reduced that the lessor might evade its liability toward the lessee. Of course if the defendant had no authority or right to deduct from the \$6,000,000 the amount of its surplus it had no right to deduct therefrom interest on such surplus, and the discussion of such alleged right is referred to more fully elsewhere.

The effect of these journal entries aggregating \$628,066.28 was to increase the defendant's book surplus by \$343,045.33, and to increase its construction account by \$586,410.87, and their inclusion by the defendant among the amounts which they had charged against the \$6,000,000 was utterly indefensible.

We go back, therefore, to the preliminary statement of Point I, namely, that the net expenditure of the defendant out of the \$6,000,000 proceeds of stock and bonds did not exceed \$4,259,741.62 for conversion and construction purposes, and that \$1,740,258.38 of such proceeds remained unexpended and were retained by the defendant for its own purposes.



## II.

**The plaintiff expended more than \$2,000,000 in conversion of defendant's railroads under the lease in excess of all amounts advanced by the defendant out of the \$6,000,000 fund.**

The evidence of the plaintiff's expenditures is thoroughly analyzed in one of the detailed chapters of this brief (see p. 112): It shows overwhelmingly and conclusively that prior to December 31, 1895, the plaintiff had expended, after deducting all advances made by defendant and all credits from the sale of old material, etc., \$1,913,020.84 in addition to which it paid over to the defendant for conversion and construction purposes the sum of \$308,340.35 with interest, \$16,136.46, making the total payments by the plaintiff \$2,237,497.65. By September 1, 1894, the plaintiff had expended in excess of the amounts received from the defendant at least the amount of \$1,740,258.38, and is entitled to recover that sum from the defendant with interest at 6% from said date. If the proofs should not be considered absolute of the excess of the plaintiff's expenditures on August 17, 1894, there certainly can be no question that such excess on December 31, 1895, was at least several hundred thousand dollars more than the \$1,740,258.38 for which the plaintiff asks judgment.

## THE ALLEGED DEFENSES.

Having proved that the plaintiff has expended for conversion and construction purposes more than the total amount of \$6,000,000 and had requested of the defendant the payment of the unpaid balance of the \$6,000,000, the plaintiff might rest its case, satisfied that no examination of figures and no theoretical warping of the precise terms of the lease could change the situation materially from that hereinabove set forth.

The defendant, however, sets up claims involving the construction of the meaning of the lease, which, if sustained, present a somewhat different statistical statement of liability, but do not even then disprove the contention that the defendant is still largely indebted to the plaintiff. These claims are substantially as follows:

First. That the obligation of the defendant to expend the proceeds of the \$3,000,000 of stock and the \$3,000,000 of bonds was not limited to the period after June 6, 1893, but that defendant could take out of the \$6,000,000 its alleged disbursements both before and after February 14, 1893, the date of the lease, with an alleged counterclaim for \$2,522,003.60 for expenditures prior to February 14, 1893.

Second. That the unissued \$3,000,000 of stock and \$3,000,000 of unissued bonds were part of the "moneys, credits and securities" on hand at the date the lease took effect, referred to in Article IV of the lease, and that from the sum of such moneys, credits and securities on hand the defendant had the right under the lease to deduct the amount of its book surplus fictitiously increased and its obligations before turning over the balance to the lessee from time to time for meeting the expenses of conversion and construction of the railroads leased.

Third. That in August, 1894, the plaintiff and defendant entered into an accounting of the moneys expended by the defendant out of the \$6,000,000, and agreed that the defendant had expended about \$600,000 in excess of the sum which it was required to expend under the terms of the lease, alleging as evidence thereof the tripartite agreement of August 15, 1894.

Fourth. That even if the defendant is indebted to the plaintiff, the plaintiff is not the owner of such indebtedness, but by various agreements and mortgages has assigned it to the Brooklyn Rapid Transit Company.

A brief outline of the plaintiff's reply to these defenses set up by the defendant is here presented as follows:

### III.

**The defendant was not entitled to charge against the \$6,000,000 fund any construction or conversion expenditures for labor performed and materials furnished prior to June 6, 1893. The alleged oral agreement to the contrary was void, if made.**

*(a) It was never intended that Article V of the lease should become operative before about June 6.*

In 1891, before the defendant actively commenced the work of converting its system of horse railroads into electric railroads, its total authorized capital stock was \$6,000,000, all of which was issued and outstanding, and its total authorized bonded indebtedness was \$6,000,000, of which only \$3,000,000 had been issued prior to December, 1892.

In 1892 the defendant increased its total authorized capital stock from \$6,000,000 to \$12,000,000, and \$3,000,000 of the increased amount was issued during 1892; so that the defendant entered the year 1893 with \$3,000,000 of its stock and \$3,000,000 of its bonds unissued, but authorized to be issued.

In December, 1892, a proposition was made to the defendant by the firm of Hollins & Company, representing a so-called syndicate, and in response to such proposition the directors of the defendant issued a circular to its stockholders, recommending the acceptance of the proposition of the syndicate, the leading features of which were:

1. A proposed lease of the railroads and property of the defendant to another street surface railroad corporation not yet specified.

2. The formation of a holding company which was to acquire all of the stock of the proposed les-



see, and by the issue of its own stock was to raise a fund of \$4,000,000 to be deposited as guaranty for the performance of the proposed lease by the proposed lessee.

3. Stockholders of the defendant were to be given the right to subscribe pro rata for nine-tenths of the stock of the holding company, and such right was to continue until sixty days after the approval of the lease by the stockholders of the two railroad companies.

The proposed lease was executed by the parties and approved by their respective stockholders on February 14th and 15th, 1893; but the proposed holding company was not yet incorporated and no agreements had yet been executed for raising the \$4,000,000 guaranty fund. It was not until March 11, 1893, that the Long Island Traction Company was incorporated, with a total authorized capital stock of \$30,000,000, and on April 7 (p. 22, Exhibit 5) the Traction Company entered into an agreement with one Lawrence, by which Lawrence was to deliver to the Traction Company the entire capital stock of this plaintiff, the Brooklyn Heights Railroad Company, and \$4,000,000 in cash, in consideration of the issue to him of the entire \$30,000,000 total authorized capital stock of the Traction Company. This agreement was carried out and the \$30,000,000 stock of the Traction Company was issued to Lawrence and deposited by him with the New York Guaranty & Indemnity Company; such deposit being made under and in pursuance of an agreement, dated April 7, 1893 (Exhibit 8, p. 235), by which all stockholders of the defendant should be entitled to subscribe for \$27,000,000 of the stock of the Traction Company, on a basis by which holders of \$100 par value of the capital stock of the defendant might subscribe for \$300 par value of the stock of the Traction Company, paying for the Traction

stock at the rate of \$15 per share of the par value of \$100 each.

As defendant's stock was then worth at least \$150 for each \$100 of par value, and each \$100 par value could invest \$45 in Traction stock, the financial interest of the defendant's stockholders in the Traction Company became less than one-third their financial interest in their own company.

Under the agreements then made the stock of the Heights Company, as well as the stock of the Traction Company, was deposited with the New York Guaranty & Indemnity Company, with the provision that unless the Heights Company should accept possession under the lease within one hundred days from April 7, 1893, then both the Heights stock and the Traction Company stock should be returned to the original owners.

It thus clearly appears that the program of the parties contemplated the possible postponement of the taking effect of the lease and the delivery of the demised property to the lessee until one hundred days from April 7, 1893, to wit, until July 15th.

On April 17th, 1893, the parties to the lease entered into an agreement for the delivery of the lease, which provided among other things that the stockholders of the defendant should have the right within sixty days from April 17th, 1893, to subscribe for stock of the Traction Company on the basis above stated. This again shows that the parties contemplated a probable postponement of the taking effect of the lease and of the delivery of the demised property to the lessee until June 16th, 1893.

In the meantime, on February 15th, 1893, after the execution of the lease by the parties thereto and its approval by the stockholders of the plaintiff, one Markey obtained a preliminary injunction against the delivery of the defendant's property to the Heights Company. It will be noticed that this in-

junction in no way interfered with the delivery of the lease which was made on April 17th.

On May 19th, 1893, an agreement was made for the dissolution of the Markey injunction, under which it might have been dissolved at any time thereafter. But it was not actually dissolved until June 6th, 1893.

It is perfectly clear from the foregoing history that the delay in the delivery of the lease from February 15th to April 17th, and the delay in the taking effect of the lease until June 6, 1893, were in no way due to the Markey injunction. If this injunction had been really a factor in the delay, the motion to continue the injunction could have been argued on the return day of the order, February 18th, and the Markey injunction would have been vacated forthwith as was held by all the Courts in Flynn vs. Brooklyn City, 158 N. Y., 493; 9 App. Div., 269, affirming Special Term.

*pp. 7239-7534*

On June 6th, 1893, the New York Guaranty & Indemnity Company, without waiting for the final payment of the subscription to the stock of the Traction Company by the stockholders of the defendant, advanced the \$4,000,000 for purposes of the guaranty fund, and the lease went into effect on that day.

The Heights Company had substantially no resources for raising necessary funds for continuing the conversion work, which by Article XXII of the lease, it agreed to do, except from the proceeds of the \$3,000,000 of unissued stock and \$3,000,000 of unissued bonds, which by Article V of the lease the lessor agreed to advance to the lessee for the purposes of conversion, and it was a necessary part of the financial program adopted that the lessee should be provided with the entire \$6,000,000 proceeds of the stock and bonds which the defendant by Article V of the lease agreed to supply to the lessee.

This historical outline of events leading up to the taking effect of the lease on June 6th, 1893, shows that there was no unexpected delay in the taking effect of the lease, but that the parties distinctly contemplated that the defendant should remain in possession of the property to be demised for a period which would probably continue beyond June 6th, 1893, and that in the meantime the defendant should proceed with the work of conversion, paying therefor and contracting liabilities therefor in the ordinary course of business, and by Article IV of the lease the defendant agreed to pay all such liabilities as of the date the lease should take effect, which was June 6th, 1893. All of these facts and circumstances negative any implication, or opportunity for a suggestion, that the parties intended that the expenditure of the \$6,000,000 proceeds of stock and bonds should be made for any materials furnished or labor performed in the work of conversion before June 6th, 1893.

*(b) All the provisions of the lease require the defendant to provide for its conversion obligations and payments before June 6th without encroaching on the \$6,000,000 fund.*

These provisions are thoroughly discussed in the introductory statement and elsewhere in this brief and will not be repeated here. Unquestionably the lease did not "take effect" until June 6th, nor did it become an enforceable contract until that date, *nor was the plaintiff in position to request the expenditure of the \$6,000,000 fund until that date.*

*(c) The alleged oral agreement to the contrary was void, if made.*

Defendant called witnesses who were stockholders of the plaintiff in February, 1893, and attempted to prove a request from them to the defendant that defendant proceed at once with the work of



conversion, but these witnesses disagree as to what funds were to be used in such conversion. It is impossible to spell out a contract to continue conversion at the plaintiff's expense from their evidence. Such a contract could not have been made because:

1. The defendant admittedly had on hand about \$500,000 conversion funds of its own.

2. Stockholders could not make a contract binding the plaintiff.

3. The lease was not delivered until April 17th, and all prior negotiations became on that date merged into and conclusively fixed by the lease, so that evidence of oral negotiations prior to that date could not be received.

4. The form of the lease had been approved by the stockholders of both companies, and under §78 of the Railroad Law the terms of the lease could not be altered even by the directors or officers of the company after such approval.

5. Plaintiff and defendant were advised by eminent experts in railroad and contract law, namely, Mr. Trull and Mr. Auerbach. It is ridiculous even to suggest that these eminent counsel advised Mr. Lewis on February 15th, after the approval of the lease by the stockholders, because a preliminary injunction had been served returnable three days later, restraining the taking possession under a 999 year lease, that he could radically change the provisions of the 999 year lease, which had been approved by the stockholders of both railroad corporations, by oral negotiations with some of the stockholders of one of the parties.

## IV.

**Even if defendant was entitled to charge against the \$6,000,000 fund, construction and conversion expenditures for labor performed and materials furnished prior to June 6, 1893, it is, nevertheless, still indebted to the plaintiff for the deficiency in such expenditures below \$6,000,000, whether it be credited with expenditures after April 17, 1893, or after February 14, 1893.**

If, by any possibility, the lease could be construed so as to entitle the defendant to credit against its \$6,000,000 obligation, its expenditures for labor performed and material furnished in construction and conversion work after February 14, 1893, the mathematical situation as shown by the defendant's bill of particulars, its stipulations, and the evidence, discussed more in detail later on in this brief, is briefly as follows:

Total charges by the defendant to conversion and construction after February 14, 1893, irrespective of time of delivery of materials or performance of labor represented by such charges, and cash advances,	\$7,063,091.41
Less deductions (details shown on pp. 159-160 of this brief);	1,020,921.35
	<hr/>
Balance,	\$6,042,170.06
Funds applicable to conversion and construction (pages 160-161),	\$7,101,641.16
	<hr/>
Unexpended balance,	\$1,059,171.10

In this computation, aside from the journal entries which the plaintiff has included in its deductions, there are only comparatively small amounts over which there can be any controversy as to the facts, and the reasons advanced for the deductions of the journal entries as to the period after June 6, 1893, apply with substantially equal force to the period after February 14; for most of the entries, if justified at all as a charge to construction, relate to alleged payments prior to February 14, 1893. The defendant in Exhibit 1457 has attempted to make a computation along the same lines, but the results are equally favorable to the plaintiff if from the disbursements are excluded the journal entries above referred to and all the payments after February 14, representing work done and materials furnished before that date, and if to the construction fund resources are added items aggregating \$50,444.63 from the sale of real estate wrongly credited to surplus. (See detailed analysis of Exhibit 1457 at page 239 of this brief.)

The net situation was precisely the same if April 17, 1893, is taken as the date from which the obligation to expend the \$6,000,000 accrued. This is true because the deduction of payments for conversion expenditures between February 14 and April 17 from the amount which defendant was under obligation to expend on February 14 must also be made from the funds applicable to conversion on February 14, leaving the balance of conversion funds the same on April 17 as on February 14. This is shown in detail on pages 162 *et seq.* of this brief.

**V.**

**The \$3,000,000 of stock and \$3,000,000 of bonds, unissued, but authorized to be issued, on June 6, 1893, were not “moneys, credits and securities” then on hand, within the meaning of Article IV of the lease, and the defendant was not entitled to deduct from such stock and bonds the amount of its liabilities as of that date, and if the defendant did have such right, adherence to the provisions of the lease as thus construed would have left the defendant indebted to the plaintiff for a still larger amount than is claimed in this action.**

The defendant's answer alleges:

“IV. The defendant further avers that the only securities on hand at the date of said lease and at the date of the execution and delivery thereof, and at the date said lease took effect, were the said Three million dollars (\$3,000,000) of capital stock, and said Three million dollars (\$3,000,000) of bonds authorized but unissued, mentioned and referred to in the complaint and said lease and that the word ‘securities’ in said Article IV of said lease referred to and was intended and meant by the plaintiff and defendant to refer to and include, said \$3,000,000 of unissued stock and said \$3,000,000 of unissued bonds, mentioned and referred to in said lease.”

The defendant has itself proved that it had securities on hand at all those dates, other than the stocks and bonds.



This allegation of the answer indicates that defendant's counsel expect to claim that the parties to the lease intended that the \$3,000,000 of stock and the \$3,000,000 of bonds which on June 6, 1893, were still unissued, but authorized to be issued, should be treated as a part of the "monies, credits and securities" of the lessor then on hand, from which the lessor should be entitled under Article IV to pay its indebtedness of that date, other than its bonded indebtedness, together with "the amount of its surplus earnings, diminished by a pro rata amount of accrued interest and accrued rentals agreed to be paid by the lessor, and a pro rata amount of taxes for the current year estimated upon the amount of taxes for the preceding year"; and that only the balance of such "monies, credits and securities" remaining after making such payments, was to be expended by the lessor in payment at the request of the lessee from time to time of the cost of converting the railroads of the lessor into an electric railroad.

It is certainly a novel proposition that stock and bonds unissued, but merely authorized to be issued, are included within the class of property described as "monies, credits and securities."

Mr. Thompson testified that the \$3,000,000 of bonds were signed by the officers of the defendant, and deposited in a safety deposit vault, in 1892. But no claim is made by anyone that any of the bonds were issued or delivered, to any party in whose hands they would be a debt or an enforceable obligation of the company, prior to November 1, 1893. On the contrary, the secretary of the Kings County Trust Company, Trustee under the mortgage securing the bonds, states (pp. 352-3), that the first certification and delivery of any of the bonds was of 1200 bonds on November 3, 1893. The defendant's answer repeatedly states that the \$3,000,000 of bonds were unissued at the time the

lease took effect, and were issued after that date.

Bonds of a corporation unissued, but authorized to be issued, are in the same category as notes payable to bearer, and signed by a natural person, but retained in his pocket. He may have legal capacity to issue such notes to any amount, but such notes retained in his own pocket are neither monies, credits nor securities. The legal capacity of a corporation to issue its bonds may be limited by law. The corporation may be authorized by law to issue bonds up to that limit, and thereby it has a borrowing capacity up to that amount. It may have complied with all the requisites for the issuance of the bonds, including their full and complete execution, but until delivery of the bonds, the corporation is still in the same position as a natural person, who has his own notes signed by himself, in his own pocket, and is hunting for some one who will loan him money and accept the notes as evidences of indebtedness for the loan.

Likewise stock authorized to be issued, but unissued, has been well described as "the legally prescribed capacity of an empty stomach." The total authorized amount of capital stock, not yet issued, is merely an expression of the limit of legal capacity to receive proceeds from the issue of the stock, when issued, beyond which limit no further supply from that source can be received. If the stock has been issued, and then comes back into the treasury of the corporation, that is another proposition. The corporation may then be entitled, in practical effect, to dividends thereon, which in reality merely increases its surplus for distribution to its actual stockholders. But that bonds and stock authorized to be issued, but unissued, are either "moneys, credits or securities", is a proposition which will not stand serious discussion for a moment.

Moreover, the references throughout the lease to the \$3,000,000 of stock and \$3,000,000 of bonds available to the lessee for conversion purposes, indicates clearly the intention and understanding of the parties to the lease, that the \$3,000,000 of stock and \$3,000,000 of bonds described in Article V, should be wholly independent of, and not confused with, nor be a part of the "monies, credits and securities" described in Article IV. Expenditures up to the time the lease takes effect, are assumed and agreed to be paid by the lessor, and there is no express statement, nor is there any implication, anywhere in the lease, that if such "moneys, credits and securities on hand" are not sufficient to equal the surplus earning and the liabilities agreed to be paid by the lessor, the deficiency may be made up from any of the property leased, or from the proceeds of the \$6,000,000 stock and bonds thereafter to be issued.

It is true that the moneys, credits and securities on hand when the lease took effect did not equal the liabilities agreed to be paid by the lessor, and the surplus as shown by the lessor's books. But that fact did not in any way oblige the lessee to pay any additional amount, or in any way entitle the lessor to deduct the excess of surplus and liabilities over and above its moneys, credits and securities, from either the proceeds of the \$6,000,000 of stock and bonds or from the proceeds of sales of real estate. There would be no business necessity for such a course. The lessor would be in funds from moneys agreed to be paid by the lessee for supplies on hand, and as rentals, from which to make up any balance of liabilities over and above its moneys, credits and securities. As to the surplus to be distributed to its stockholders, that was a matter wholly between the lessor and its stockholders with which the lessee had nothing to do under the terms of the lease, so long as there was no balance of

moneys, credits and securities over and above such surplus to be expended by the lessor in conversion and construction.

The assumption that the lease authorized the deduction by the lessee of the amount of its liabilities or of its surplus, or of any part of either, from the proceeds of the \$6,000,000 of stock and bonds, is wholly without foundation. Every expression and every implication of the lease is against such assumption. Whether the lease is studied literally and technically, or broadly and liberally with reference to its general scope and purpose, whether taken from a strictly legal or from a common sense and business-like point of view, the result is the same.

The lessee was to pay rentals equal to the dividends and interest on the full \$6,000,000 of stock and bonds, and it was clearly intended that the lessee should have the use, during the term of the lease, of the property resulting from the expenditure of the entire proceeds of the \$6,000,000 of stock and bonds, without reservation of any deduction therefrom for the benefit of the lessor.

The proceeds of the \$6,000,000 of stock and bonds and the proceeds of sales of real estate not needed for railroad purposes, were to be expended for conversion and construction or acquisition of new properties without any deductions whatever. All construction work and property thus paid for from funds provided by the lessor are, on the termination of the lease, to be surrendered to the lessor with the property originally leased, without any compensation by the lessor for such surrender. But the lessee agrees, out of its own funds, to complete such further conversion and construction as may be necessary, and to acquire further property as may be necessary, and such further conversion and construction and other property paid for by the lessee "out of its own funds" is to be likewise surrendered



to the lessor on the termination of the lease, but the lessor must then pay to the lessee the cost thereof.

Even if, however, the \$3,000,000 of stock and \$3,000,000 of bonds, unissued, but authorized to be issued, should be treated as part of the "monies, credits and securities" described in Article IV, nevertheless, in spite of the efforts of the defendant to make fictitious increases of its surplus, to be deducted therefrom, the balance still remaining of such monies, credits and securities, which, by Article IV was to be available to the lessee for conversion purposes, would be even greater than the amount claimed by the plaintiff; and the complaint is broad enough to entitle the plaintiff to recover under Articles IV and V, as so construed as well as under those two articles properly construed. For, if the stock and bonds were part of the moneys, credits and securities on hand, the defendant was obligated by every consideration of equity and sound business principles to appraise them at their cash value. Truly the "monies, credits and securities" of which, after the deductions had been made, the lessee was to have the benefit could not be deliberately understated in value while the defendant's surplus which was one of the deductions was fictitiously increased in amount. Whatever the provisions of Art. V required as to the use of the proceeds, if the funds created by Art. IV and Art. V are to be considered as one fund, then the provisions of Art. IV assume greatly increased importance to the lessee, for upon the size of the funds therein created for its benefit in the conversion of the railroads depended the entire success of the lessee in its ability to complete conversion and to operate the property successfully, and to earn a profit over the large rental based upon the amount of stocks and bonds of the defendant outstanding. On the date the lease took effect the market price of the stock is conceded to have been at least 162½. The moneys, credits and securities

on hand, including the stock at that figure, and the bonds at the price at which they were subsequently sold, were \$9,216,775.39, while the defendant's obligations and alleged surplus as of that date were \$1,726,451.90, leaving a balance of conversion funds of \$7,490,323.49, as against which the defendant advanced for the plaintiff \$4,548,820.60, and still owes \$2,935,509.01. This is shown in detail in the following table:

**Moneys, Credits and Securities on  
Hand June 6th, Under Defendant's Theory.**

Bonds and actual premium received,	\$3,221,903.50	
Stock, at 162½,	4,875,000.00	
Miscellaneous monies, credits and securities (p. 323).	485,026.65	
Supplies,	251,335.59	
Received from plaintiff,	324,476.81	
Obligations paid by plaintiff,	42,532.54	
High Street property,	16,500.00	
		<hr/>
		\$9,216,775.39

Defendant's Obligations, June 6th.

Loans, outstanding,	\$600,000.00	
Operating and Construction liabilities accrued	640,934.09	
Book Surplus, June 6th, after deducting accrued operating liabilities,	485,517.81	1,726,451.90
	<hr/>	<hr/>
Conversion funds June 6th,	\$7,490,323.49	
Advanced to plaintiff,	4,548,820.60	
	<hr/>	<hr/>
Payable to plaintiff,		2,941,502.89

## VI.

**The tripartite agreement did not effect a release or discharge of the defendant from its obligation to pay the plaintiff the balance of the \$6,000,000 fund.**

(a) Immediately after the agreement of April 17th, 1893, and before the delivery of possession under the lease, the rights of the defendant's stockholders to subscribe to Long Island Traction Company stock began to be actively bought and sold in the market, and upon the issue of the Traction Company stock in June, 1893, the stock itself became active in the market, so that while the stockholders of the defendant originally had the right to subscribe for nine-tenths of the Traction Company stock, they had by June 6 parted with a considerable portion of their interest in the Traction Company. As heretofore shown on p. 42 of this brief, even at the beginning the stockholders of the defendant had an interest in the Traction worth less than one-third their interest in the defendant. Obviously the more Traction Company stock was sold by the defendant's stockholders, the greater became their interest in depleting the conversion fund provided for in the lease, if they could thereby increase the alleged surplus which might be distributed to themselves in dividends, and could retain part of the \$6,000,000 fund to pay their own obligations.

We therefore find that in September, 1893, various fictitious journal entries were made, with that result in view. As time went on it became apparent that the earnings of the plaintiff from operation were not as great as was expected, and the expense of conversion increased beyond the original anticipations. By the Spring of 1894 it became evident

that the plaintiff must have large sums of money to complete the conversion in addition to amounts paid over by defendant.

In January, 1894, an agreement had been made by which the \$2,000,000 par value of the stock of the Brooklyn, Queens County & Suburban Railroad Company would be forfeited to the defendant in case default were made in the provisions of the lease.

A temporary financial plan was prepared by the terms of which the plaintiff and the Traction Company were to mortgage the guaranty fund, the stock of the Heights Company and the amounts payable by the lessor on the termination of the lease, to secure an issue of collateral trust notes of the total authorized amount of \$3,000,000. In connection with this mortgage the directors of the plaintiff and defendant authorized the execution of the so-called tripartite agreement, which is attached to the answer, and which is alleged to be an accord and satisfaction between the parties hereto.

A discussion elsewhere of the figures on the yellow sheet shows conclusively that no reference was made to the obligations of the defendant under Article V of the lease, and no accounting was made of the \$6,000,000 fund provided in that article.

In fact, just prior to the execution of this tripartite agreement an independent expert accountant, Mr. Phelps, had reported that the defendant was indebted to the plaintiff in the sum of \$1,059,154.55. This report of Phelps was considered by the officers of both parties, and no other account with respect to plaintiff's or defendant's expenditures, than this report of Phelps, was considered by any of the parties prior to the execution of this tripartite agreement. It is, therefore, certain that the tripartite agreement is not based upon any accounting of the \$6,000,000 fund.



The agreement itself does not purport to be an accord and satisfaction. It does contain recitals of indebtedness by the plaintiff as follows:

“Whereas, said Heights Company is indebted to said Brooklyn Company in large sums of money for advances made to it by said Brooklyn Company in and by the conversion of said demised railroads into an electric railroad and the equipment of the same as such, in anticipation of the sale of certain real estate and personal property of the Brooklyn Company, which under the terms of the lease were to be sold and the proceeds applied to such electrical construction.”

Article Third of the tripartite agreement contains a covenant on the part of the Heights to execute and deliver a note for \$308,340.35 “being a part of the indebtedness of the said Heights Company to said Brooklyn Company.”

In Article Fourth of the tripartite agreement the defendant contracts to advance

“the money requisite to pay any balance due or to become due on contracts made by it for the construction, conversion and equipment as electric railroads of said railroads demised by it to said Heights Company, and any balance due by it as of date of June 6, 1893, for \$347,036.44 or thereabouts.”

The lease provided in Article XLV that unused real estate should be sold and the proceeds devoted to the construction of new property.

If the plaintiff had, prior to August 16th, used part of the money advanced by the defendant in the construction of such new properties, it might have been considered not a proper charge against the \$6,000,000 fund, but an expenditure which was to be met out of the proceeds of the sale of real estate and not at any time to be paid either by plaintiff or defendant in any other way. If this fact were

true, then the recital above set out would have been a true statement, and the directors of the plaintiff might have relied upon some such state of facts in executing this tripartite agreement. In fact, the tripartite agreement itself and the covenants of the defendant therein contained may well have been part of a cunningly devised scheme by which the defendant was to get possession both of the \$4,000,000 guaranty fund and the Suburban stock and of the expenditures made by the plaintiff upon the property. The only obligations in the tripartite agreement assumed by the defendant are as follows:

1. It accepts a note of the plaintiff for \$308,340.35, secured by collateral trust notes of the par value of \$457,000. It is shown elsewhere that no such indebtedness existed, and by this maneuver the defendant was securing the payment to itself of an indebtedness which did not exist.

2. The defendant agreed to advance \$347,036.44 to be used in paying the amounts unpaid on construction obligations of the defendant. It seems that on some of the construction contracts made before June 6, which were in process of completion during the first year, there remained unpaid about \$350,000. If the lease should become defaulted or the plaintiff were thrown into bankruptcy, the defendant by its contracts would have to pay this amount. It therefore by this tripartite agreement loaned this amount, secured by the deposit of collateral trust notes, one-third greater in par value than the amount so advanced.

3. The defendant also agreed to advance further sums which would bring the total, including this \$308,340.35 and the \$350,000, up to \$1,375,000. In fact, it never advanced another dollar, but on the pretext that plaintiff had not deposited the \$4,500,

required by Article Twenty-second of the tripartite agreement to be deposited daily as security for the rent, defendant refused to make further advances and notified the plaintiff that in accordance with the terms of the notes which it had received, it would sell the collateral. It undoubtedly expected in this way to obtain title to \$975,319.04 of the collateral trust notes, without having expended any more than \$350,000, and by its ownership of such a large proportion of the collateral trust notes, to dictate the re-organization of the Traction Company, or to obtain possession of the plaintiff's properties. Such result was averted by the formation of the Brooklyn Rapid Transit Company and the payment of the notes.

*(b) The plaintiff's directors at the time of the making of the tripartite agreement were largely interested in the stock of the defendant, and hence disqualified to represent the plaintiff, and plaintiff is not bound by their action.*

The entire history of the journal entries, the refusal to comply with the provisions of the lease with respect to the \$6,000,000 fund, the exaction of this \$308,340.35 note, and the attempt to foreclose on the collateral, serve only to emphasize the situation at the time the tripartite agreement was made, namely, that the directors of the plaintiff during all this time had very much greater financial interest in the welfare of the defendant than in the welfare of the plaintiff, and under these circumstances any contract made between the plaintiff and defendant by these directors or with their sanction was voidable at the option of the plaintiff.

As soon as independent interests secured control of the plaintiff, investigations were begun resulting in the present action, by which the plaintiff seeks to enforce the legal and equitable obligations of the defendant under the lease.

**VII.**

**The issue raised by the defendant in its answer that the plaintiff is not the owner of the claim, demand or cause of action set forth in the complaint, nor of any part thereof, finds no support in the testimony, documentary or oral.**

This matter is fully discussed at pages 202-238 *et seq.* of this brief.



**VIII.****Summary.**

We have sought in the preceding resumé of the facts and arguments to give to the Referee in as small a compass as possible a clear and correct understanding of the issues involved in this action and of the proofs established by the evidence.

In a record embodying, as does the record of this action, nearly eight thousand pages of testimony, innumerable exhibits and many tabulations of figures, it would be quite easy to confuse the Court and obscure the fundamental and substantial questions by unnecessarily accentuating the immaterial parts of the case. In spite of the voluminous character of the record, the real questions involved are few and well defined, and there is no great difference as to the mathematical proof. Under the plain provisions of the lease there will be no difficulty in determining the extent by which the defendant has failed to fulfill its obligations. There is no substantial difference between the parties as to figures.

It is assumed, however, that after the Referee has become familiar with the general outlines and proof of the case he will desire further detailed information regarding the various points presented, and this has been given in the subsequent chapters of this brief, wherein the evidence and arguments relating to each phase of the case have been more thoroughly reviewed and discussed.

While many years have elapsed since the plaintiff's cause of action arose, its attempt to ascertain its rights and prosecute them has been opposed by every known device. Immense quantities of proof have been required as to facts about which there could have been no dispute and where stipulations would have saved much time and work of the Court. In a difference arising between business men in-

tent upon no object except that founded upon justice, there need not have been required these years of controversy. Had the lessor been confident that its obligations had been fairly and fully discharged it would have promptly furnished to the lessee the figures and facts which it had alone in its possession of the expenditure of the \$6,000,000, it would not have resisted every attempt to ascertain these facts, it would not have furnished conflicting and inconsistent statements affecting its own obligations and transactions under the lease, and it would not have prolonged through eight and one-half years the taking of the testimony which was to establish the plaintiff's claim or justify the defendant's conduct. Conscientious men with no improper financing to conceal would not thus anxiously, and with apparent deliberation, have prolonged the adjudication of an action affecting so materially the interests of the defendant's stockholders.

It has been recounted above and is shown more in detail later that the control of the plaintiff lay in a board of directors whose interest in the financial welfare of the defendant was vastly greater than their financial interest in the welfare of the plaintiff.

Prior to the transactions of August, 1894, and following the successful flotation of the Traction Company's shares upon the market, the interests of the two companies, separate as they were under the lease, were vested in separate bodies of stockholders, yet the Board of Directors of the lessee company still remained firmly under the domination of the lessor. It was then that the lessor, foreseeing the doom which seemed likely to fall upon the lessee, and looking forward with reasonable assurance to getting back its property with millions of additional capital expended thereon and with a \$4,000,000 guaranty fund as a forfeit, sought, in the guise of philanthropist, to undermine the foun-

dations of independence remaining to the lessee, and, having agreed to play the part of the good Samaritan, then defaulted on that agreement, with the inevitable result that the Traction Company, which owned the stock of the lessee, was plunged into bankruptcy and the financial bubble blown in the inebriate times of 1892 (which were not unlike those of 1907), was pricked—to the great disaster of innocent victims, and to what appeared likely to be the great profit of the formulators of this scheme of high finance. Then it was that the outside stockholders of the Traction Company, anxious to save what they might out of the wreck, fearful lest they might lose not only the property leased but another great system of railroads which had been acquired after the lease, asserted their independence, reorganized the Traction Company, furnished millions of new money to enable the lessee company to retain and develop its properties, and by changes in the directorate and management established for the first time a control assertive of the lessee company's rights and jealous of their protection. It was not until after July 1, 1895, that this assertive movement tangibly showed itself and not until after January 1, 1896, that the successor of the Long Island Traction Company, namely, Brooklyn Rapid Transit Company, was organized and fully empowered through its ownership of the stock of The Brooklyn Heights Railroad Company to insist upon the performance by the lessor of the obligations which it had failed to discharge under the terms of the lease.

The first duty naturally was the upbuilding of the physical property, damaged materially as this had been by the prospective termination of the lease and the failure of the lessor to provide the funds called for by the lease. Secondarily, but almost simultaneously, an inquiry was instituted to ascertain why the funds provided for by the lease were

not forthcoming. Not a single entry or statement in the books or records of the plaintiff revealed in any way an account of the expenditure of the \$6,000,000 by the defendant. A study was then made of such information as was available in the published reports of the defendant and inquiries were addressed to former officers of both the plaintiff and defendant, who were supposed to be familiar with the facts, without any satisfactory result.

On July 10, 1897, the President of the plaintiff, by letter, requested the President of the defendant to answer certain questions, among which were the following:

“1. What was the amount of moneys, credits and securities of the Brooklyn City Railroad Company on hand June 6, 1893, which were excepted by paragraph III of the lease from the property leased and the amount of which was by paragraph IV of the lease to be expended by the Brooklyn City Railroad Company for conversion purposes after deducting therefrom certain amounts of indebtedness and surplus earnings?

“2. What was the amount required to pay and discharge the indebtedness, obligations and liabilities of the Brooklyn City Railroad Company as of June 6, 1893, other than its bonded indebtedness?

“3. What was the amount of the surplus earnings of the Brooklyn City Railroad Company on June 6, 1893?

\* \* \* \* \*

“7. Will you please furnish us an itemized statement of the expenditure by the Brooklyn City Railroad Company of the \$6,000,000 proceeds of stock and bonds agreed to be expended by the Brooklyn City Railroad Company under and by paragraph V of the lease?

“8. Will you please give us an itemized statement of the expenditures by the Brooklyn



City Railroad Company of the surplus of moneys, credits and securities on hand June 6, 1893, over and above the deductions authorized to be made therefrom by the Brooklyn City Railroad Company under and by paragraph IV of the lease?"

No answer having been received, the attention of the defendant's President was again called to the matter under date of August 27, 1897, and still again under date of September 10, 1897. On September 21, 1897, came the alleged reply in the shape of Plaintiff's Exhibit 1453. The Referee's attention is particularly called to the statement accompanying this reply. It was, of course, no categorical reply, is entirely inconsistent and conflicting with the defendant's bill of particulars subsequently rendered after the beginning of this action, and with the proof and defense of the defendant, but it showed on its face that the total advances to the plaintiff after June 6, 1893, were only \$4,529,306.42, a trifle more than is conceded by the plaintiff, and showing a deficiency of advances of over \$1,400,000! The statement was so lacking in detail that it seemed as if no definite conclusions could be reached without an examination of the lessor company's books and vouchers, and this examination was begun in the summer of 1898. On account of the great amount of detailed investigation required, which was interrupted by the plaintiff's acquisitions of other properties requiring the examination of other companies' books, the report of the plaintiff's accountants was delayed until January, 1900, whereupon the plaintiff's directors authorized the submission of its claim to the defendant, made a demand upon the defendant for the amount found to be due and immediately began this action to recover.

Whatever may be said as to detailed features of the accounting, the entire evidence is overwhelm-

ingly corroborative of the claim of the plaintiff that the defendant has failed by a very large sum to discharge its obligations under the lease. Whether the obligation as to the \$6,000,000 fund be limited to the period after June 6, 1893, or after April 17, 1893, or even after February 14, 1893, there is still owing to the plaintiff a very large amount. The whole tenor and language of the lease indicate clearly the construction which its provisions must bear. The lessor was to turn over its properties, and was to provide funds for their conversion into electric railroads, the expenditure of which funds was essential to the ability of the lessee to pay its obligated rentals, and those rentals were based upon the securities of the defendant, in part issued prior to the taking effect of the lease and in part to be issued thereafter. Clearly the amount of rentals required would not have been the same had the proceeds of the capital issues not been intended to go into the property. Clearly new capital was not to be issued after the date of the lease to reimburse the defendant for expenditures made prior to the lease. The books of account of the defendant even as of February 14, 1893, indicate clearly that no such reimbursement was required or would have been justified. The proceeds of capital issues at that time exceeded by about half a million dollars the amount which had been charged to the cost of road and equipment. The defendant had capital funds at that date of not less than half a million, shortly thereafter increased by sales of real estate, with which to carry on the work of conversion prior to the date that the lease should take effect. All these facts were presumed to be within the knowledge of both parties to the lease. It is not conceivable that the plain provisions of the lease could have been otherwise construed during the period intervening between the approval of the lease by the stockholders of the two companies and the

final delivery of the property under the lease. They were, either by ignorance or intention, misconstrued and distorted within a year after the lease went into effect. This misconstruction or violation was evidenced first by the fictitious swelling of the defendant's construction account and surplus, by journal entries relating to a period long prior to the conception of the lease and in many cases entirely fictitious, and then by the deduction of this exaggerated surplus from the \$6,000,000 fund which was to be expended for the benefit of the lessee. Not content with this betrayal of obligation, the defendant then sought to charge against the \$6,000,000 fund, and thereby to reimburse itself for all construction expenditures after February 14, 1893, although ample construction funds were on hand between that date and June 6, 1893, for carrying on the necessary conversion work preliminary to the transfer of the properties. The net result has been to withhold from the lessee the benefit of expenditures aggregating upwards of \$1,700,000. In the meanwhile, with impaired credit, the lessee has been compelled to acquire other funds at high rates of interest, and at the same time for upwards of fifteen years to pay a rental equal to dividends at the rate of 10 per cent. per annum on stock, the expenditure of the proceeds of which was to have gone into the property after June 6, 1893, a large part of which never has gone into the property, either before or since June 6, 1893. For upwards of fifteen years the plaintiff has been carrying this burden, endeavoring honestly and conscientiously to discharge its obligations under the lease and its duty to the public, with great sacrifices, during many of these years not being able to meet those obligations out of the earnings of the property leased, but making up the deficits elsewhere, and for more than eight of these years has been trying

to recover from the defendant the moneys which were thus wrongly diverted.

It would seem as if the original sin of greed and selfishness which incited the formation of the Long Island Traction scheme, had attended each subsequent step in its history, so far as the defendant's relations to it are concerned. The crowning infamy is that, having received all the benefits hoped to be conferred by the lease and actually obtained therefrom, the defendant still persists and has persisted for upwards of fifteen years in retaining and using for the enrichment of its own stockholders moneys which belonged to the plaintiff.

Where has the money gone? Large amounts of it went to pay the defendant's obligations, which, by the lease, should have been paid out of its own funds. Eight hundred and forty thousand dollars of it went to the defendant's stockholders in the shape of dividends over and above the 10% paid out of the plaintiff's rentals, and over \$400,000 of it is to-day in the company's treasury, represented by interest bearing securities and cash, liable at any time to be distributed among its stockholders.

Upon such reckless finance, upon such contemptuous disregard of the obligations of contract, upon such gross and transparent fraud on innocent investors, the Courts of our country have ever been quick to set the seal of condemnation. The time has gone by when men can with impunity escape the responsibility of the betrayal of sacred trusts. Should the offense causing this action be allowed to stand unrebuked, should the victims who have suffered by it and are still suffering from it be unprotected? The direct damage to the thousands of investors represented by the plaintiff would be nothing compared with the injury to that public confidence which demands and expects a strict adherence to high ideals of business.



## PART II.

**Detailed discussion of Point I showing that the net expenditures of the defendant out of the \$6,000,000 were not more than \$4,259,741.62 for conversion purposes.**

In making proof as to the damages which it is entitled to recover in this action, plaintiff was met with the difficulty of proving how much the plaintiff had actually expended out of the \$6,000,000 fund, because since the action was one for damages and not an action for an accounting, the burden of showing the failure of the defendant to expend the fund was upon the plaintiff.

The first step, therefore, was to require the defendant to serve a bill of particulars of its disbursements from the \$6,000,000 fund. The defendant did not see fit to serve an account of the \$6,000,000 fund, but instead served a document entitled "expenditures made on account of construction and conversion of road from horse to electric power."

The bill of particulars is divided into six schedules, in accordance with the division in defendant's ledger, and these schedules are headed "construction account," "real estate account," "equipment account," "extraordinary expenditures on account of electricity," "amounts advanced to the Brooklyn Heights Railroad Company account of construction," and "advances to disbursing committee."

The first four of these schedules commenced with the vouchers of July, 1892. It is admitted in the case that the dates at the left of the numbers of the vouchers show the date of payment by the defendant of the several vouchers.

Since in any event the plaintiff was concerned only with expenditures made after the lease, no evi-

dence was given by the plaintiff with respect to any vouchers paid before February 15, 1893.

Except in two or three instances plaintiff was not disposed to dispute the character nor the payment of the various vouchers listed by defendant, because the evidence shows that the accounts were kept, so far as the vouchers and monthly transfers were concerned, practically in the same manner and with the same verity before June 6, 1893, as after that date, when under plaintiff's direction.

In order to determine the exact expenditures of defendant, the items of defendant's bill of particulars were examined and its list of direct payments, exclusive of journal entries, is assumed to be completely set out in Schedules "A," "B," "C," and "D" attached to that bill of particulars.

Since the lease required the defendant to pay and discharge its obligations as of the date the lease took effect, namely, June 6, 1893, out of the moneys, credits and securities on hand, it was necessary to determine what were the outstanding obligations of the defendant for construction on June 6, 1893; and since the defendant claimed that it was entitled to all of its expenditures after February 14, 1893, the plaintiff also showed what expenditures were made by the defendant after February 14, 1893, on account of obligations incurred after that date, and what payments were made after February 14 and after June 6, respectively, for obligations outstanding on those respective dates.

In order to facilitate the proof, defendant and plaintiff entered into a stipulation (pp. 392-8), which was intended to cover all of the claims of the defendant with respect to its alleged construction expenditures. It was found that the total amount alleged by its bill of particulars on Schedules A to E, inclusive, to have been charged or paid after February 14, was \$7,413,091.41, and therefore the first item of

the stipulation was to the effect that the defendant after February 14, 1893, expended in the payment of the cost of conversion and construction or advanced to the plaintiff or charged to construction and conversion, amounts aggregating that sum.

It was found by examining the bill of particulars that between February 14 and April 17, the date of the delivery of the lease, the defendant entered on its bill of particulars as construction payments the sum of \$501,139.85. This amount was therefore treated in Article II of the stipulation, and by this stipulation it was agreed that out of the \$501,139.85 paid between February 14 and April 17, \$48,118.17 represented obligations of the defendant outstanding on February 15, 1893; \$197,036.69 represented items actually furnished between February 15 and April 17; and \$255,984.99 represented items as to the time of the delivery of which the two parties could not agree. These last items were therefore listed in the Exhibit marked 20, which is part of the evidence in this case.

In the same way it was found that between April 16 and June 6, \$937,974.54 was paid out by the defendant, and that this amount was divisible by stipulation into \$22.98, obligations prior to February 15; \$73,432.02, obligations between February 15 and April 17; \$503,515.20, items furnished between April 16 and June 6. As to \$361,004.34, the parties could not agree, and the items making up this amount were listed in Exhibit 21.

In the same way it was found, as appeared in Article IV of the stipulation, that the defendant paid out \$328,416.10 after June 5, and of this amount \$11,697.03 was on account of obligations prior to February 15; \$2,196.65 were obligations between February 14 and April 17; \$6,730.02 for materials between April 16 and June 6; and \$27,364.28 for materials after June 6; and \$218,528.12 items as to which the parties could not agree and which are therefore listed as Exhibit 22.

Taking up the items of actual construction disbursements found in Exhibits 20, 21 and 22, as to which the two parties could not agree, the plaintiff called a great number of witnesses, and by these witnesses proved the date of delivery of most of the material and labor covered by these exhibits. This evidence is scattered through the record at pages 435-454, 455-950, 2551-9, 2593, 2815-22, 2854, and at various other pages referred to on the summary of results submitted with this brief.

The plaintiff prepared a summary of the result of this evidence which it submitted to the defendant (p. 7481) with a statement that this summary indicated the date when the work was done or material furnished, in accordance with proof as understood by plaintiff's counsel. Counsel for defendant were requested to check this statement over and to indicate any items with respect to which they did not agree with counsel for the plaintiff, in order that the work of the Referee with respect to these items might be shortened.

To comment in detail upon all this evidence would enlarge this brief to an unwarrantable extent.

The aforesaid summary will, therefore, be submitted as "Appendix B," with the understanding that if the defendant objects to the conclusions of plaintiff's counsel as to the effect of the proof with respect to any of the vouchers listed, then plaintiff's counsel will submit memoranda covering the proof as to such vouchers.

The last page of the summary, "Appendix B," shows that the net total of Exhibits 20, 21 and 22, being the so-called disputed items, was \$835,517.44, and of this total the proof shows that the work was done or material furnished as follows:

Before February 14,	\$194,345.99
Between February 14 and April 17,	299,394.26
Between April 17 and June 6,	312,630.44
After June 6,	29,146.76

As to this last item of \$29,146.76 the proof is lacking as to the date of delivery of the items making up this amount, as such items were mostly made up of payments on construction contracts, as to which it was impossible for the plaintiff to get evidence.

This stipulation and this evidence as to the date of delivery of materials did not touch any of the journal entries, which have been treated in another part of this brief, nor did it touch Exhibit E of the bill of particulars, but did cover all the items of Schedules "A," "B," "C" and "D," of the bill of particulars, except journal entries.

All of the items in their schedules, therefore, relate to obligations incurred prior to June 6, except the \$27,364.28 covered by stipulation (p. 320), and by proof, or rather lack of proof, as above shown, \$29,146.76.

The total of Schedule "E," including the charge for supplies on hand, was \$4,622,018. From this the defendant admits that the last two items aggregating \$25,548.11 should be deducted. These payments were, in fact, the proceeds of real estate sold in 1897, which proceeds were turned over to the plaintiff under the provisions of the lease and expended by it upon defendant's railroad. They could not by any possibility have anything to do with the \$6,000,000 fund.

From the total of Exhibit E should also be deducted the journal entry of \$41,655.41 on account of interest on surplus as heretofore shown.

From this total should also be deducted (see pp. 327-8, 337-345) the sum of \$357 out of voucher 35,221, and all of voucher 35,298, namely, \$1,891.40. It appears from the evidence referred to that these two were construction vouchers, and that at the time they were paid the two companies agreed on the division which was to be made.

Voucher 35,298 is a Brooklyn City voucher for the balance of a much larger bill which is spread on



the records in full, commencing at page 342. The Brooklyn Heights paid all of this bill except \$1,891.40, and it appears that the Brooklyn City paid the balance of \$1,891.40 by this voucher 35,298, and it also appears that \$1,891.40 was the exact amount of the construction liability of the defendant on this bill up to June 6, 1893. There was, therefore, an actual assumption and payment by the defendant in June, 1893, of so much of this construction liability as accrued up to June 6; yet the defendant has included this as a charge against the \$6,000,000 fund in Exhibit E.

The total deduction to be made from Exhibit E, therefore, amount to the following:

The last two items being real estate items,	\$25,548.11
Part of voucher 35,221,	357.00
All of voucher 35,298,	1,891.40
The journal entry which charged to plaintiff interest on the alleged surplus,	41,655.41
<hr/>	
Making a total of	\$69,451.92
To be deducted from the total of Exhibit E, which was	4,622,018.00
<hr/>	
Leaving the total of that exhibit	\$4,552,566.08

From the stipulation (p. 394) and from Exhibits 20, 21 and 22, and from the summary of the evidence, Appendix B herewith submitted, it appears that all of direct payments made by defendant after June 6 to creditors on account of conversion, amounted to \$328,416.10.

Of this amount (p. 394) there was paid on account of liabilities accruing after June 6, according to stipulation,	\$27,364.28
According to the proof as summarized in Appendix B,	29,146.76

The gross amount shown by Exhibit E  
after June 6 after deductions of im-  
proper items, 4,552,566.08

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\$4,609,077.12

To this amount should be added the  
sum of \$13,542.10

Out of the \$80,000 journal entry, which  
as shown by the discussion of that  
item applied to generators received  
after June 6.

Also from the Interest Account, 4,132.05

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Gross payments by defendant after  
June 6, \$4,626,751.27

After June 6, 1893, plaintiff paid certain out-  
standing liabilities of the defendant (pp. 329-32)  
which, to the amount of \$41,349.35 (Defendant's  
Exhibit 1467) were credited to plaintiff on defend-  
ant's books of account, but none of them were ever  
actually paid except by such credit. The total of  
these items was \$46,454.02, proof shows (pp. 2270+ 2203)  
that of this amount \$42,532.84 was the actual  
amount of operating liabilities of defendant paid by  
plaintiff.

The plaintiff paid to defendant on July 1, 1895,  
its note, which it was forced to give in connection  
with the tripartite agreement, of \$308,340.35, and  
paid to defendant interest on such note amounting  
to \$16,546.16. The amount of this note, \$308,340.35,  
was credited in the books of the account of the de-  
fendant to its construction account (pp. 315 and  
348), and by plaintiff was also charged in its con-  
struction account against the Brooklyn City (see  
copy of defendant's ledger), and was at all times  
treated by both plaintiff and defendant as a re-  
payment by plaintiff of part of the total included in  
Exhibit E. The discussion of this note heretofore

in this brief shows that it was given absolutely without consideration, and the entire transaction must be regarded as an involuntary repayment by the Heights to the City of the amount of this note and interest, out of construction funds advanced.

The net payments out of the \$6,000,000 fund which were rightly chargeable to that fund therefore stand as follows:

Gross amount paid by the defendant	
after June 6 on construction obligations after that date, together with	
gross advances to the plaintiff as	
above,	\$4,626,751.27
Repayments by plaintiff, namely,	
Operating expenses of de-	
fendant,	\$42,532.84
Note,	308,340.35
Interest paid on same,	16,546.16
	<hr/>
	\$367,419.35
Total net payments advanced on ac-	
count of construction by defendant,	4,259,331.92
Construction fund,	6,000,000.00
	<hr/>
Net amount due plaintiff,	\$1,740,668.08

This result varies from that found in the table at page 327, prepared by plaintiff at the commencement of this trial, only in the fact that the plaintiff has been unable to prove the time of delivery of certain items paid after June 6 by the defendant, amounting to \$29,146.76, and such items are therefore allowed to the defendant in this calculation, thereby reducing the amount claimed on page 328 by that amount, and in the fact, that the operating expenses of defendant paid by plaintiff are reduced from \$46,454.02 to \$42,532.84, and that interest of \$4,132.05 is allowed to defendant.

**The defendant was not entitled to increase its book surplus by arbitrary journal entries made long after June 6, 1893, and to deduct the surplus so increased from the \$6,000,000 fund, nor to increase its construction account by these fictitious entries.**

The defendant has served upon the plaintiff a bill of particulars, and has introduced proof with respect to its alleged disbursements from the \$6,000,000 fund.

In order to deplete that fund in September, 1893, and March, 1894, it caused certain journal entries to be made upon its books. These journal entries are all recited in the bill of particulars as charges against the \$6,000,000 fund, and a detailed consideration of these journal entries is necessary. The method of their entry upon defendant's books is set out at pages 7017 to 7022. These entries consist of transfers from operating account to construction account; transfers from passenger earnings to construction account; transfers from surplus and deficiency to construction; transfer from interest account to construction, and transfers from the supply account, first to a suspense account, and then to construction.

The effect of these entries was to fictitiously enlarge either the book surplus or the construction account of the defendant or both, and in either case to increase the amount which defendant claims the right to retain out of the \$6,000,000.

While part of these entries are made as of June 30, 1893, on the defendant's ledger, none of them were actually made before September 30, 1893. The first of them appear in the resolution of the Execu-

tive Committee and Board of Directors of the defendant of September 27th and 28th, 1893.

September 28, 1893 (p. 3543), the Board of Directors of defendant adopted a resolution:

“On motion duly made and seconded, the Executive Committee and Messrs. Leggett and Keeney were authorized to examine the accounts of the Brooklyn City Railroad Company *for the year ending June 30, 1893*, with authority to instruct the Secretary and Treasurer to make the necessary entries to correct the account to that date by charging construction account and crediting operation account with like amounts, and also charging construction account with the amount paid for interest and dividends amount to \$90,000 on account thereof, and crediting surplus account with like amount, and such other corrections as may be necessary and proper.”

At page 177 is found the resolution of the Executive Committee of September 27, 1893, meeting with Mr. Keeney and Leggett as follows:

“The Secretary further reported to the Committee that it was necessary to revise and readjust the accounts of the Company *for the year ending June 30, 1893*, by charging to construction and crediting to operation, sundry items of expenses for services rendered, material furnished paid from the operation funds, which were chargeable to construction, in all amounting to \$160,119. The report of the Secretary was approved and referred to the full Board for determination. The Secretary further reported that the \$120,000, being a dividend on \$3,000,000 of the capital stock paid on January 3, 1893, had been charged to surplus account, but inasmuch as this stock was issued expressly for the purpose of securing money to construct or reconstruct the road, he suggested that a portion of all of this money should be charged against the construction account and the surplus account credited with



the same. Upon investigation, the Committee decided that the surplus account should be credited and the construction account debited with \$90,000 at the current rate of interest for this time, viz, 3%, and the matter was referred to the full Board for approval."

In compliance with these two resolutions, the so-called journal entries, except the transfers from supply account, were made.

In order to understand the method of making these entries, it should be observed that the so-called construction account of the defendant was kept under several subdivisions, such as construction, real estate and equipment, and these several journal entries were distributed through these three accounts in accordance with these resolutions.

A total of \$82,391 was by these entries taken out of the operation account and charged to construction (p. 7017); a total of \$28,206.03, was taken out of operation account and transferred to real estate (p. 7018); a total of \$27,200 was taken out of operation account and transferred to equipment (p. 7018); a total of \$24,000 was charged, \$4,000 to real estate and \$20,000 to construction (p. 7019) and added to passenger earnings; the total of the first three items amounting to \$137,797.03, and also the total of the last two items amounting to \$24,000 were then transferred to surplus and deficiency (p. 7020), making a total increase in the apparent surplus of the defendant by this operation of \$161,797.03 and a like increase in its construction accounts.

At the same time, the defendant credited surplus, thereby increasing the surplus by that amount, the sum of \$90,000 (p. 7020), and charged this to construction. The defendant also took from the interest account (paid in 1892), which was an expense account, carried it to construction, \$27,619.67 (p. 7020), and transferred this amount to

the surplus (p. 7021); also an item of \$20,644.14, interest paid during July, August and September, 1893, which was credited to interest, and then charged to construction and credited to surplus and deficiency (p. 7021); an item of \$163.89 under date of January 31, 1894, went through the same process; also an item of \$5,297.24 on March 31, 1894 (p. 7022). Another entry is an item of \$41,655.41 which will be further discussed in connection with the note of \$308,340.35 later given by the plaintiff to the defendant.

Copy of defendant's ledger showing part of these entries is found at pages 7116-7.

These journal entries all operated to increase the alleged surplus of the defendant, by taking the amounts out of the operating account, charging them to capital account (construction, real estate, or equipment), and crediting surplus and deficiency with the same amount.

In order to force a balance in its supply account, the defendant in 1894 transferred a total of \$365,020.95 from supply account to its various construction accounts, thereby increasing by that amount the total which it claims the right to charge against the \$6,000,000 fund.

The defendant had no right to charge these journal entries against the \$6,000,000 fund, or to attempt to increase its book surplus by this means because,

(1) The journal entries related wholly to transactions covering the period from June 30, 1892, to June 6, 1893, with which the plaintiff and the \$6,000,000 had no concern;

(2) Under the terms of the lease, the defendant had no right thus to arbitrarily increase its alleged surplus or its alleged capital account after the execution and delivery of the lease and the delivery of possession thereunder;

(3) The journal entries were wholly unjustifiable either from legal or business point of view.

First: The resolution under which the journal entries (excepting the \$41,655.41 and the supply transfers of \$365,020.95) were made, expressly stated that they were made for the purpose of readjusting the account of the defendant for the year ending June 30, 1893. Mr. Lewis (p. 7293) admits that the journal entries were intended to cover transactions for the fiscal year prior to June 30, 1893. Fosdick, the defendant's accountant (p. 7133), admitted that these items transferred to surplus covered the prior fiscal year, and that there is no way of determining what part of these items should be appropriated to the period between July 1st, 1892, and February 14th, 1893, or to the period from February 14th, 1893, to June 6, 1893, except the \$90,000 item which occurred prior to February 14, 1893.

If as a matter of fact, for the year next succeeding June 30, 1892, the defendant desired to reconstruct its bookkeeping and to charge to construction any or all operating expenses thereby swelling its surplus account such inflation could not be arbitrarily made so as to injure plaintiff and the rights of the plaintiff with respect to the \$6,000,000 fund.

Second: The lease provided in Article IV that the monies, credits and securities on hand June 6th, less the amount required to pay and discharge the obligations of the lessor as of that date and less the amount of its surplus earnings, should be applied to conversion purposes.

It may be assumed that the officers of the plaintiff knew the condition of the books of account of the defendant at the date the lease was made, and at the date the lease was delivered, and at the date the lease took effect. The books of the defendant showed an apparent surplus on June 6, 1893, of a

fixed amount, which admittedly should be reduced by the then outstanding liabilities of defendant on account of operating expenses, taxes and interest. The assertion that the defendant could thereafter arbitrarily and without consideration of the plaintiff's rights increase its so-called book surplus by arbitrarily transferring large amounts from operating to construction, is contrary to the provisions of the lease, and contrary to honest dealing.

When Article IV says that "all moneys, credits and securities on hand at the date this lease shall take effect \* \* \* less the amount of its surplus earnings" shall be expended for conversion, it means the surplus on June 6, and not the surplus on June 6 increased six or seven hundred thousand dollars by bookkeeping entries based on guesswork, having no foundation in fact.

Third: None of these journal entries were justified either on the facts or by honest business methods. The journal entries here discussed consist:

(a) Of the \$90,000 added to surplus and charged to construction which had been paid as dividend before the lease.

(b) Of the other operating items aggregating \$161,797.03 (pp. 7017-22).

(c) Of transfers from supply account to construction, aggregating \$365,020.95.

These journal entries are set out as follows:

**Defendant's Bill of Particulars.**  
**Schedule "A."**

P. 25 Construction (Road Bed and Track).

To Operation.

Labor .....	\$13,510 00
Trucking—	
Horses .....	\$3,000
Horseshoeing .....	5,000
Rene'l horses .....	12,681
Provender ..	23,000
	—————\$43,681 00
Legal expenses....	7,000 00
Advertising .....	4,000 00
Salaries, Supt., etc.	12,700 00
Line repairs, labor.	1,500 00
	————— \$82,391 00

P. 25 Construction.

To Passenger Earnings—

Fares .....

	\$20,000 00
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P. 25 Construction.

To Surplus and Deficiency.

Dividend .....

	90,000 00
--	-----------

P. 26 Construction.

To interest .....

	27,619 67
--	-----------

Pp. 27 and 28 Construction.

To interest .....

	20,644 14
--	-----------

P. 29 Construction.

To interest .....

	163 89
--	--------

P. 29 Construction.

To interest .....

	5,297 24
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## P. 29 Construction.

To Suspense Account.

For sundry items paid for and  
charged to supplies but used  
on account of construction.

Supplies ..... 134,775 16

P. 30 To correct error on p. 27..... 3,000 00

**Defendant's Bill of Particulars.**  
**Schedule "B."**

## P. 53 Real Estate.

To passenger earnings, viz: fares \$4,000 00

## P. 53 Real Estate.

To Operation.

Labor .....\$14,206 03

Salaries, presid't, etc. 10,000 00

Light ..... 3,000 00

Office rent ..... 1,000 00

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\$28,206 03

## P. 53 Real Estate.

To supplies. For payments made

General Electric, July 8, 1893,

\$50,000; and August 21, 1893,

\$30,000, for generators and

changed to supplies, but

since applied to real estate... \$80,000 00

**Defendant's Bill of Particulars.**  
**Schedule "C."**

P. 8 Equipment.

To Operation.

Labor cars .....	\$14,000 00	
Motor cars .....	6,000 00	
Motors, electric....	7,200 00	
	\$27,200 00	

P. 8 Equipment.

To suspense account. For payments made General Electric Company for motors received and charged to supply account which were not charged to equipment until mounted (see inventories). Supplies.....\$150,245 79

(a) *The journal entry of \$90,000.*

This was authorized by the Board of Directors and Executive Committee of the Brooklyn City on September 27 and 28, 1893 (p. 3543).

From these resolutions and from all the evidence in the case it is an undisputed fact that on January 3, 1893, before the lease was even proposed to the stockholders of either Company, the defendant declared a dividend on its then outstanding capital stock out of its accumulated earnings. This journal entry was explained by the resolution of the Executive Committee of the defendant (p. 177), as being made because the stock upon which the dividend was declared on January 3, 1893, "was issued expressly for the purpose of securing money to construct the road."

It is a novel idea that after capital is procured by the issue of stock at par and after dividends have been declared upon such capital out of earnings then accrued, the amount of such dividends should

thereafter be charged to construction, and the apparent surplus restored by putting the amount back into surplus account. The result of this entry, as admitted by Lewis (p. 3358) was to deduct \$90,000 from the gross total going to the plaintiff, in order to arrive at the apparent result of exhausting the funds of the defendant in the spring of 1894.

The defendant's accountant Forsdick (p. 7151) admits that the \$90,000 entry was equivalent to a part of the dividend paid in January, 1893, on stock issued to stockholders and paid for by them, before the dividend was declared. Forsdick says (p. 7323) that the \$90,000 was part of a dividend which was declared on stock which was not earning any money to go to the credit of surplus; that they did not earn a dividend on that part of the capital outstanding, which was the reason for making the entry. In other words, if a dividend is paid on capital which has not earned a dividend, the dividend should be charged to construction.

On this particular journal entry of \$90,000 there is no dispute of fact in the case and no room for divergence of opinion on the facts proven. By this entry the defendant attempted to increase its apparent surplus, which it claimed it had a right to take out of the \$6,000,000 fund, by charging to construction and crediting to surplus part of the dividend paid before the lease was submitted to the stockholders, on capital paid in long before the declaration of this dividend. This entry was unquestionably contrary to good business methods, and was an attempt in effect to make this plaintiff pay \$90,000 of the dividend paid to the stockholders of the defendant on January 3, 1893.

(b) *The other journal entries transferring \$161,797.03 from operating to construction account.*

These entries cannot be justified by the defendant, even as a regulation of its own affairs. Still less

can they be justified as an attempt to make the plaintiff pay out of the \$6,000,000 fund, part of the operating expenses already paid out and charged to operating expenses by the defendant in most part before the lease was thought of.

The defendant attempts to justify these entries by proving (pp. 7070-3), that in various previous years from 1876, down to 1890, the defendant had at the end of a fiscal year transferred various items from operation to construction, on the ground that in those years expenditures on construction had been for convenience sake charged to operation, and transfer was made at the end of each year. Lewis (p. 7216), says that this was done because they were really construction charges, but temporarily put in the operating account for convenience. He says that this was not necessarily done because the officers were largely engaged in the work of construction, but because it had been done from year to year. Lewis insists that he followed the practice of thirty years (p. 7284).

*These transfers in previous years were made, however, on an entirely different basis.* In those years no construction account was carried through the year, but all expenditures were charged to operation and a lump sum was transferred at the end of each year from operation to construction. This appears conclusively from the report of Thompson, treasurer of the company, down to the fall of 1892, to the Board of Railroad Commissioners (Exhibit 1444, p. 7174), in which he said:

“This Company has always charged new work to operating expenses, and each year before making annual report has, from reports made by superintendents of the various departments, presented to the Board of Directors a statement of such new work, and by resolution of the Board duly recorded on the Minutes, the cost has been carried to the debit of costs of road and equipment.”

Lewis says (p. 7284), that they kept the accounts in that way at that time for the purpose of convenience.

It appears without dispute (see defendant's bill of particulars, defendant's journal and ledger, and evidence of Lewis, p. 7465), that at the end of each month during the entire fiscal year 1892-3, reports were received by the officers of the defendant from the various superintendents, storekeepers and foremen of the material and labor expended during that month in construction and conversion, and at the end of each month proper entries were made charging construction with the amounts so reported and crediting supply account or the other proper accounts with corresponding amounts.

Lewis admits (p. 7301), that the figures transferred by these journal entries from operation to construction were made as an even sum, as a matter of estimate, and not because there was any particular way of dividing it. For instance, he says (p. 7302), that they found that they had paid in officers' salaries during the year the sum of \$74,237.87, and he thought it fair that \$22,700 should be charged to construction; that this was true as to many of the items, but as to others they would have a memorandum account from the superintendent, which would be in exact figures of dollars and cents, but they did not necessarily go by that exactly.

As to the \$5,000 charged for horseshoeing, he says this was not based on a definite report, but was based on his knowledge of the number of horses which were being used for construction purposes, and then an estimate made of the cost of horseshoeing, which would be a proper charge to construction (p. 7302).

Notwithstanding Lewis' statement that they had memoranda from the superintendents with respect to some of these items, the defendant did not attempt to produce any such memoranda, nor was any wit-



ness called to testify to the existence or character of any such memoranda. Since the defendant had charged to its construction account every dollar covered by reports of superintendents and foremen, of which any record can be found, and since there could have been no reason whatever for the omission from such reports of any items, it is inconceivable that any of these journal entries were based on actual construction expenditures.

An exception may be made of the transfer of officers' salaries and expenditures, because we do not find any monthly charges on this account in the defendant's construction records, but the charges on these two accounts were so obviously based on guesswork, and were so obviously out of proportion to any possible charge which could be rightly made on these accounts, and were so obviously an attempt to make the plaintiff pay out of the \$6,000,000 a portion of the defendant's operating expenses before the lease took effect, that they must all be rejected as fictitious and fraudulent.

The defendant attempted further to justify some of these journal entries by producing a table (p. 7265, Ex. 1465), in which the accountant set out at length all of the charges to operation made during the fiscal year commencing July 1, 1892, and in that table set up also the amounts of these journal entries transferred from operation to construction under the several headings.

It is impossible to see the probative force of this table, because in any event the plaintiff is not concerned with the operating expenses of the defendant prior to June 6, 1893, nor with its disbursements for construction purposes prior to that date.

Taking up in detail these several transfers from operation to construction, the plaintiff conclusively showed the character of the transfer of \$24,000 from passenger earnings by the tables at pages 1967-8. It appeared from Lewis' explanation (p. 7233), that

this transfer was made on account of transportation of employees engaged in construction which had been charged to operating account when it should have been charged to construction account.

It appeared by the evidence of Throckmorton (pp. 1967-8), that all of the employees' tickets and passes issued during the entire calendar year amounted to \$34,357.55, yet the defendant arbitrarily transferred \$24,000 of this amount to construction in an attempt to swell its surplus. Throckmorton also had charge of the employees' tickets during the twelve months succeeding June 6, 1893, and after August, 1893, kept a separate account of construction tickets and operation tickets issued to employees (pp. 1969-72). He said that during the last three months of 1893 the construction tickets amounted to \$909.35, which was the exact amount included by the plaintiff under its expenditures in Exhibit 4, pages 2061-7; and the first three months of 1894 the construction tickets aggregated \$927.90, which is the exact amount charged by the plaintiff to the defendant in its construction expenditures for that period.

In April, May and June, 1894, the construction tickets amounted to \$881.

The plaintiff then proved by its accountant (p. 2091), that if the employees' tickets used in the fiscal year commencing July 1, 1892, were calculated on the same proportion to employees' pay rolls as the actual proportion between employees' tickets from October 1, 1893, to July 1, 1894, and pay rolls for that periods, the number of employees' tickets for construction purposes from February 14, 1893, to June 6, 1893, would have amounted to \$1,635.60. This demonstrates that the charge of \$24,000 was made without any knowledge of the actual amount which might justly have been transferred from operation to construction on account of passenger transportation.

Referring to the journal entry of \$7,000 for legal expenses, which was transferred from operation to construction, the plaintiff introduced in evidence (pp. 2228-38), all of the bills for legal expenses which the defendant paid which had been incurred during the period from February 1 to July 5, 1893. The total of these bills was \$22,147.66. All of them seem to have been incurred prior to February 14, 1893, either for negligence litigation or for various lobbying purposes, except the bill of Morris & Whitehouse (p. 2236) of \$12,281.32, and of this bill \$7,281.32 related to negligence actions and \$5,000 to matters relating to new franchises and matters before the Mayor and Common Council. There is no way of telling when these services were rendered or whether they were proper construction expenditures. That none of these items were considered construction items at the time they were paid is shown by the fact that while the defendant's officers very carefully apportioned all other vouchers between construction and operation, no attempt was made to apportion these bills until long after the lease took effect, nor was any claim made that any part of these legal services related to the conversion of the defendant's railroads.

Another of these journal entries is the transfer of \$12,681 from the operating account headed "renewal of horses" to construction (p. 357).

During the period from February 14 to June 6 (p. 2240), the defendant's accounts show no purchases whatever of horses, but, on the contrary, a transfer from equipment to operation of \$63,937.50.

The defendant saw fit to transfer \$5,000 from the operating account headed "horseshoeing" to construction. This is explained by Lewis as being an estimate based on the number of horses which he knew were in use and covered the entire year. It appeared that the total charge to this account from February 1 to June 6, was \$22,668 (p. 2240).

Defendant had charged on its books from February to June, under the head of "salaries of officers," a total of about \$28,000 (see Exhibit 1465), of which it transferred from operation to its various construction accounts a total of \$22,700.

The defendant also transferred from its operation account headed "provender" \$23,000 to construction, while the total amount used from February 1 to July 1, 1893, was \$179,628.78 (p. 2243).

The defendant transferred from its operating account headed "maintenance of harness" \$3,000 to construction, while its total charges on this account for five months from February to July, 1893, were \$7,338.81.

The transfers from maintenance of roadbed and track, lands, maintenance of equipment and so on, are equally without basis. Attention is especially called to the fact that while for the entire year the defendant had charged to maintenance of buildings \$16,020.02, it saw fit to transfer from this account to construction \$14,206.03.

The transfer from the advertising expense fund of \$4,000 (p. 2257), should be compared with the total payments on account of advertising for the five months beginning February 1, 1893, of \$1,879.15, the most of which was obviously strictly operating disbursements.

*These journal entries, aggregating \$161,797.03 are additional to similar entries made at the end of each month during the year in question, aggregating \$119,677.09 (Defendant's Bill of Particulars, Ex. A, pp. 4, 5, 7, 9, 12, 17, 21, 23; Ex. D, pp. 1-7).*

The other transfers from operation to construction, made in accordance with the resolution of September 28, 1893, were transfers from the interest account to construction (pp. 7020-1). As to the character of these entries there is no dispute whatever. They appear on the bill of particulars at the foot of the various schedules, alleged to have been

expended by the defendant in construction, and the first transfer of \$27,619.67 (p. 363) is found at the foot of Exhibit A of defendant's bill of particulars. This entire amount of \$27,619.67 is admittedly interest paid in 1892 on loans contracted and paid for in 1892, long before the lease was thought of. All of this was originally charged to operation, where it properly belonged. It could not possibly be a charge against the \$6,000,000 fund, nor could the defendant inflate its surplus legitimately by such a transfer.

The next item transferred from interest to construction is an item of \$20,644.14, also found on Exhibit A of defendant's bill of particulars. This is made up of interest paid by the defendant on loans contracted by it in the summer and fall of 1893. It attempts to justify this interest charge to construction, although it had primarily been charged to operation, by assuming that the loans were made on account of construction.

It is true that the defendant borrowed money during the summer of 1893, prior to the sale of its stock and bonds. It is also true that this might be a legitimate charge to construction, if the accounts were honestly kept.

The plaintiff's accountant, however (pp. 2252-5), computed the interest upon the payments made by the defendant to the plaintiff out of the \$6,000,000 fund, commencing with June 6, 1893, down to the time when the proceeds received by the defendant from the stock and bonds exceeded the advances. On page 2252 it appears that the interest on advances made ~~by~~ <sup>to</sup> the plaintiff down to August 15, was \$2,027.76. On that date the defendant received from sale of stock \$72,507.22, leaving the net advance on that date \$420,950.32. Interest is computed on that down to the next receipt of money from stock by the defendant, namely, August 31, and this interest amounted to \$1,470.86. A similar



method was pursued down to the point when the receipts from stock exceeded the advances to the plaintiff, and the total interest actually chargeable upon such advances amounted to \$4,132.05.

The defendant continued to receive money from its stock and bonds, upon which the plaintiff paid interest and dividends as rental, until in December, 1893, the defendant had received \$1,328,707.24 in excess of its disbursements (p. 2255). On January 1, 1894, the balance was \$1,136,197.68; the balance at the close of January, 1894, \$876,350.03; and the balance at the close of March, 1894, was \$1,701,963.71.

Unquestionably the defendant received interest on these bank balances, and if it were computed only at three per cent., it would aggregate four or five times the amount actually due the defendant for interest on loans contracted by it during June, July, August and September, 1893, for the purpose of advancing money to plaintiff. Yet we find that the defendant (Exhibit 1458, Schedule 5), transferred to its surplus account all interest on daily balances, amounting to \$4,903.42, notwithstanding the fact that the plaintiff was paying interest on the securities from which these moneys were received.

The next two items transferred from interest to construction are an item of \$163.89 (Exhibit A of Defendant's Bill of Particulars, p. 371 of Evidence), and an item of \$5,297.24, also found on Exhibit A of defendant's bill of particulars, page 372. These last two items apparently covered interest on loans made in January, February and March, 1894, by the defendant. Why the defendant should have made loans and expect the plaintiff to pay interest on them, when at the same time the defendant had in its hands a balance of from \$800,000 to \$1,800,000 received from securities on which the plaintiff was paying interest, is a question that cannot be answered.

Defendant admits having received on its bank balance from May 1, 1893, to April 27, 1894, \$4,036.60 (p. 2454).

(c) *The next journal entries to be considered are the transfers from supply account of amounts aggregating \$365,020.95.*

It appeared from the evidence of both plaintiff and defendant (pp. 2098-2103 and pp. 7315-17), that it was the custom of the defendant not to make any entry on the books, of materials purchased, until the day when the bill was paid. On the day the bill was paid the amount was charged in what was denominated "supply account." It was proven also by both sides that at the end of each month the storekeeper, or other person in charge of supplies, sent in to the Secretary of the Company a report in which he stated the amount in dollars and cents of supplies consumed during that month and the purpose for which they were used, namely, construction or operation.

This supply account was started on July 1, 1890, by entering in the supply account as a debit and crediting to surplus and deficiency \$105,243.46 (p. 2109), because the officers of the Company at that time found that they had on hand that amount of supplies, which had been charged to operation, but were really on hand as an asset.

In November, 1890, they found also that they had on hand rails to the value of \$18,000, which were not included in the July inventory, and an entry was made putting that amount into surplus and charging it to construction (p. 2110).

After that date there is no evidence in the books of the defendant that any inventory was ever taken until June 6, 1893. Mr. Thompson does testify (p.

), that the supply account was adjusted in accordance with monthly inventories down to November, 1892, but his memory on this point is evi-

dently inaccurate, as an inspection of the supply account itself shows that there were monthly transfers from supplies to other accounts, but nowhere does there appear any reference to any inventory.

It is clear and was admitted by the defendant that under the method of handling this supply account, no record would appear on the books of supplies lost, stolen, broken or of supplies which the storekeeper reported erroneously or not at all. The account was carried along in this manner down to June 6, 1903, when an inventory was taken (Plaintiff's Exhibit 3).

On May 31, 1893, this supply account showed a debit balance of \$187,144.68 (p. 2098). From that time on the defendant continued charging against this supply account bills which were outstanding on June 6, 1893, until on September 30, 1893, the debit balance in this supply account had reached \$607,280.22.

From the inventory it appears that the supplies on hand, which under the terms of the lease were to be paid for by the plaintiff, all other material on hand being by the terms of the lease leased to the plaintiff, amounted to \$251,335.59. This amount was credited to supplies on the defendant's books, and was also credited on plaintiff's books as advanced by the defendant to the plaintiff on account of construction. As to this item there is no dispute. This left the debit balance in the supply account \$335,944.63 on September 30, 1893. This account was increased by sundry additional charges for supplies paid for, for which the defendant owed on June 6, 1893, so that on January 31, 1894, the debit balance was \$365,020.95.

On January 31, 1894 (p. 2107), we find the following entry in the defendant's books:

"To real estate, \$80,000; to supplies, \$80,000;  
for payments made General Electric Company

July 8, 1893, \$50,000, and August 21, 1893, \$30,000, for generators and charged to supplies, but since applied to real estate."

This entry, which will be discussed later, had the effect of charging to the construction account \$80,000, and reducing the supply account debit to \$285,020.95.

The defendant on March 31, 1894, balanced this account by transferring the entire debit balance to a suspense account by an entry (p. 2107), as follows:

"Suspense account \$285,020.95; to supplies, \$285,020.95; for difference in amount of supplies on hand as per ledger and as per inventory pending adjustment with Brooklyn Heights Railroad Company."

This balance in this supply account after being transferred to the suspense account was later all charged to construction by the following entries (p. 2108):

"Equipment \$150,245.79; to suspense account, \$150,245.79; for payments made General Electric Company for motors received and charged to supply account which were not charged to equipment until mounted (see inventory)."

The other entry is:

"Construction, \$134,775.16; to suspense account, \$134,775.16; for sundry items paid for and charged to supplies, but used on account of construction; above entries on this folio made by direction W. A. H. Bogardus, Secretary and Treasurer, 1893."

This entry it appears was in the handwriting of Mr. Swin, and these two entries exactly balance the supply account.

No explanation or papers could be found anywhere justifying these two entries, the effect of which was to increase the construction account of

the defendant and to permit it (under its theory) to deduct from the \$6,000,000 fund this entire balance of the supply account amounting in all to \$365,020.95.

The defendant has attempted to justify the item of \$150,245.79 for motors received and charged to supply account by quoting from the inventory certain items.

Of these two journal entries the item of \$150,245.79 corresponds in amount with the sum of certain items in the inventory. A list of these is found on pages 377-381 of the record, and defendant has apparently adopted this list as the items making up the entry of \$150,245.79, which was made on its books as being motors received and charged to supply account which were not charged to equipment until mounted. In fact, this list is made up of car trucks, harness and all kinds of electrical apparatus which might be used in repairing cars. None of the items in this list were items for which the plaintiff was to pay under the lease. They were expressly covered by that part of the granting clause at the bottom of p. 8 of the Lease: "Also all horses, harness, cars, locomotives, engines, tools, implements, machinery, railroad equipments, power stations, electrical appliances and equipments, stable equipments and fixtures, and all other property of whatsoever kind or nature, except money, credits and securities, acquired, owned or possessed by said lessor for use in the construction, maintainance or operation of said demised railroad or railroads and properties." In fact, the items (\$251,335.59), for which the plaintiff was to pay under Article XI of the lease, were charged to the plaintiff and taken out of the supply account before this forced balance was made. All of the items in this list are items which under Article I, p. 8, the lease were leased by the defendant to the plaintiff. The fact that they were on hand on June 6, 1893, is



proof positive that though they may have been charged into the supply account after June 6, they had been received before June 6, and their cost was an obligation of the defendant on that date, which, under Article IV of the lease, it had to pay out of its moneys and credits and securities.

The defendant has attempted to prove by its expert accountant, Mr. Forsdick (pp. 7060-68), that this total of \$150,245.79 was made up of certain payments for motors which had not theretofore been charged to construction.

The accountant testified (p. 7061) that the total payment for motors by the defendant was \$895,497.50, and makes this up by including the following payments:

September 1, 1892,	\$50,000.00
September 8, 1892,	50,000.00
September 16, 1892,	200,000.00
January 20, 1893,	215,497.50
May 18, 1893,	80,000.00
June 20, 1893,	100,000.00
July 8, 1893,	50,000.00
July 24, 1893,	50,000.00
July 30, 1893,	50,000.00
August 18, 1893,	20,000.00
August 21, 1893,	30,000.00
	<hr/>
	\$895,497.50

Mr. Forsdick then showed (pp. 7065-7) the following transfers from supplies to equipment:

August, 1892,	\$33,118.62
September 30, 1892,	78,773.50
October 31, 1892,	84,833.00
November 30, 1892,	36,357.00
December 31, 1892,	49,687.90
January 31, 1893,	55,747.40
February 28, 1893,	35,140.10
March 31, 1893,	39,992.70
April 30, 1893,	47,299.81
May 31, 1893,	69,493.90
February 28, 1894, the journal entry above mentioned for gen- erators,	80,000.00
Total transfer of,	<hr/> \$610,443.93

The defendant's accountant adds to this total the last journal entry of \$150,245.79, making \$760,689.72 and subtracts that from the total amount of \$895,497.50, with a result that he says that \$134,807.88, charged to supply account was not taken out.

That this is a forced balance and a forced entry appears from the fact that the payments to the General Electric Company, as appears from the bills, were for motors and generators with the corresponding equipment, and did not include the other items in the inventory which in the list quoted by the defendant are said to make up the total of \$150,245.79. Certainly, the defendant did not pay the General Electric Company for the trucks and harness which appear in the inventory as making up the amount which the defendant now says is made up of motors not charged up.

In giving this evidence defendant's accountant omitted to say anything about other transfers from supplies to equipment, which apparently related to

electrical supplies, as appears from the defendant's bill of particulars, "Schedule B";

August 31, 1892,	\$4,674.00
September 30, 1892,	14,700.00
September 30, 1892,	11,984.93
October 31, 1892,	4,500.00
October 31, 1892,	17,712.87
November 30, 1892,	7,500.00
November 30, 1892,	3,561.74
December 31, 1892,	5,415.00
December 31, 1892,	6,532.05
January 31, 1892,	10,586.00
January 31, 1892,	7,014.77
February 28, 1893,	18,250.00
February 28, 1893,	5,967.81
March 31, 1893,	18,100.00
March 31, 1893,	8,546.34
April 30, 1893,	17,877.00
May 31, 1893,	21,115.00
June 30, 1893,	5,527.00

Total,	<u>\$189,564.51</u>
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The defendant therefore transferred from its supply account to its electrical car equipment account from August 31, 1892, the sum of \$189,564.51, in addition to transfers of \$610,443.93 mentioned by Forsdick. Whether this was made up of the amount said by the defendant's accountant to be included in the journal entry of \$150,245.79, nowhere appears.

The actual explanation of the situation is that the defendant commenced to buy motors early in 1892, paying therefor \$150,000 in February, 1892, (p. 7108), and this item it charged directly to equipment on May 5, 1892. It made no entry with respect to transfers from supplies to equipment until August 30, 1892, when it credited supplies and charged equipment \$33,118.62, for motors. Until

that date no charge for motors had been made to supply account, nor had any credit appeared for motors mounted between February and August. The motors for which a total of \$300,000 was paid in September, 1892, were received at least as early as June, 1892, many of them must have been mounted before the system of transfers from supplies was adopted in August, '92.

Since the method of making monthly transfers from supplies was not begun until August 30, 1892, any supplies used between May 5, 1892, and August 30, 1892, would not be credited to supply account and defendant may have received and mounted or used up motors to the amount of \$150,000 in that period, which would not appear on the defendant's books under its peculiar method of bookkeeping until paid for. All its subsequent payments were undoubtedly for motors received long prior to the date of such payment. With respect to this entry, also defendant admits that the motors, in any event, were received prior to June 6, 1893 (because it claims they were inventoried on June 6), and were, therefore, an obligation of the defendant on that date, and probably they were received before July, 1892. Under these circumstances this charge cannot possibly stand as against the \$6,000,000 fund.

The next entry of \$134,775.16 (p. 7067) is said by defendant's accountant to be the difference between the book account representing the various supplies on hand and the supplies inventoried and credited to that account, after taking out this entry of \$150,245.79 (p. 7068).

The defendant's expert admitted that the accounts of the Company did not indicate any inventory after July, 1890 (p. 7115), and that he found no entry adjusting the supplies account with the inventory since November, 1890.

Defendant's expert admitted that by these journal entries the credit balance of the defendant's surplus account was increased that amount (p. 7126), and it is practically admitted in the case that this item of \$134,775.16 is a forced balance of the supply account. Forsdick says (p. 7153) that it applies from the date of the last adjustment in the material and supplies account; so that the amount may have been taken out from the supplies at any time between November, 1890, and June 6, 1893 (p. 7153). He admits that generally in a concern of this kind where an inventory of supplies has not been taken for some time, the inventory does not equal the amount charged to the supply account.

This particular journal entry is fictitious for three reasons:

First. It was a forced entry made to strike a balance of the supply account, so that the defendant could convert into cash a balance remaining on its books not represented by any property.

Second. If the defendant had the right to charge it out to any account, it should have distributed it over the period from November, 1890, to June 6, 1893, and in any event it would have been out of the period with which this plaintiff is connected.

Third. An arbitrary allotment of this exact balance in the supplies account to construction, when the supply account itself shows that every month supplies were taken out for operation as well as for construction, cannot by any possibility be upheld.

*The \$80,000 journal entry.*

The defendant transferred from supplies to equipment (see Defendant's Bill of Particulars, Ex. B, p. 53), \$80,000 on February 28, 1894, and charged this amount to real estate. The entry reads:

"Real estate to supplies for payments made General Electric July 8, 1893, \$50,000 and



August 21, 1893, \$30,000; for generators and charged to supplies, but since applied to real estate, \$80,000."

The fact with reference to this generator account is shown by the evidence of Clark, general auditor of the General Electric Company (pp. 2854-6). He says that the General Electric Company, or its predecessor, under a contract dated April 21, 1892, sold certain generators to the defendant, of which there were shipped:

October 13, 1892, 2 generators,	\$23,978.00
October 31, 1892, 2 generators,	23,978.00
Boxing same,	257.30
January 6, 1893, 2 generators,	23,978.00
Boxing same,	144.30
May 6, 1893, 2 generators,	23,978.00
Boxing same,	144.30
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Total,	\$96,457.90

He said that the defendant paid on this account:

February 17, 1893,	\$30,000.00
July 11, 1893,	50,000.00
August 23, 1893,	30,000.00
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Total,	\$110,000.00

The first payment of \$30,000 is charged to equipment under date of February 15, 1893, on defendant's bill of particulars (Ex. B, p. 30).

The next two payments were charged to supplies by the defendant, and this journal entry was an attempt to transfer them to construction and to charge them against the \$6,000,000 fund.

As the shipments on this account prior to June 6, amounted to \$96,457.90, while the total payments made by the defendant on this account amounted to \$110,000, plaintiff admits that the defendant was entitled to charge against the \$6,000,-

000 fund \$13,442.10, being the difference between these two amounts, because that payment applied to shipments made after June 6, 1893, under the same contract; but the balance of the journal entry, since it was to the extent of \$66,457.90, an obligation of the defendant on June 6, 1893, and to the extent of \$42,335.60 an obligation of the defendant on February 14, 1893, cannot be included as a charge against the \$6,000,000 fund, for reasons before stated.

*The journal entry of \$41,655.41.*

This is found on defendant's bill of particulars (Ex. E, p. 3), and reads:

“For interest at 6% per annum from June 6, 1893, to August 15, 1894, \$582,594.59; surplus account under tripartite agreement \$41,655.41.”

This is an attempt to charge the ~~defendant~~ <sup>plaintiff</sup> with interest on an alleged surplus, although at all times subsequent to about September 30, 1893, the defendant had in its hands funds applicable under its theory to its surplus, very much in excess of any amount to which it was possibly entitled.

The defendant was not, in fact, entitled to the principal amount upon which this interest was charged under the lease, much less to interest thereon, as will appear in the next point of this brief.

**There was no foundation in fact or in law for the note of \$308,340.35, given by the plaintiff to the defendant under the tripartite agreement and afterwards paid by the plaintiff.**

The legal situation of this tripartite agreement and the history of its inception will be discussed at length later in this brief.

The tripartite agreement itself, attached to the answer as Exhibit A, is a document executed by the plaintiff, the defendant and the Long Island Traction Company on August 17, 1894. One of its recitals is as follows:

“Whereas, said Heights Company is indebted to said Brooklyn Company in large sums of money for advances made to it by said Brooklyn Company in and by the conversion of said demised railroads into an electric railroad and the equipment of the same as such, in anticipation of the sale of certain real estate and personal property of the Brooklyn Company, which under the terms of the lease were to be sold and the proceeds applied to such electrical construction and equipment.”

Among the agreements contained in the tripartite contract, is the following:

“Third. The Heights Company and the Traction Company jointly and severally agree that at or before the delivery of this agreement they will execute and deliver to the Brooklyn Company their joint and several promissory note payable on the first day of August, 1897, or sooner after the first day of July, 1895, at the option of said Heights Company and Traction Company, which note shall be for the sum of \$308,340.35, being a part of the indebtedness of the said Heights Company to said Brooklyn Company, and shall bear interest at the rate of six per cent. per annum, payable semi-annually.”

In 1895 the Brooklyn Rapid Transit Company succeeded to the assets of the Long Island Traction Company, among which was the stock of the Brooklyn Heights Railroad Company (p. 2827), and Col. Williams was elected secretary and treasurer of the Brooklyn Rapid Transit Company. He found in the accounts of the Heights a record of two notes given by the Heights to the Brooklyn City (p. 2828), and attempted to investigate the origin of these notes. In the course of that investigation he was handed a yellow sheet (p. 2829) by Mr. Swin, and a copy was put in evidence (Ex. 1451).

The defendant afterwards put the original yellow sheet in evidence (Defendant's Exhibit 56).

Col. Williams (pp. 2830-2873), stated his understanding of the origin of the figures appearing upon this Exhibit 56.

Forsdick admits that Col. Williams' evidence with reference to the items making up this yellow sheet are correct (p. 7082).

There is, therefore, no dispute as to the origin of the items on this yellow sheet, which may be summarized as follows:

The first line purports to show the book surplus of the defendant on June 1, 1893, as \$732,055.73. Defendant's expert (pp. 7137-8), explains this total, which does not appear on defendant's books, as being the result of adding to the surplus account of March 31, 1893, the receipts down to May 31, 1893, and deducting from the total the operating expenses paid during that period. To this book surplus on June 6, 1893, of the defendant should be added the passenger receipts for the first five days in June, and from the result should be subtracted the outstanding accrued operating expenses made up of interest, taxes, and direct operation liabilities. This would show the exact surplus on the books on the date the lease took effect as \$485,383.77.

Under the main head "debits" on this yellow sheet

appear seven columns headed "direct charges," "passengers," "miscellaneous," "interest," "operation," "construction dividend," "rental B. H. R. R. Co."

The items under the sub-head of "direct charges" have no relation to the surplus on June 6, because the item of \$220,761.26 is made up of premiums on bonds and premiums on stock received by the defendant after June 6, which it assumed by this yellow sheet to make a part of its profits for which the plaintiff should account. The four small items under the head of "direct charges" were miscellaneous receipts of the defendant after June 6.

Of the items under the heading "passengers" the first \$65,846.03 represented the actual passenger receipts of the defendant for the first five days in June, while the item \$24,000 is the journal entry referred to in another part of this brief, which could not be charged up to the plaintiff.

The receipts under the heading "miscellaneous" came after June 6, 1893, and had nothing to do with the surplus on that date.

The items under the heading "interest" were made up of journal entries, by which the defendant undertook to charge to the plaintiff interest on some loans made in 1892, by transferring them from operation to construction and crediting them to surplus.

The item under the heading "operation" of \$137,797.03 is entirely made up of the various journal entries discussed under that heading.

The item under the head of "construction dividend" \$90,000 is another journal entry relating to the dividend paid in January, 1893, which the defendant attempted to charge up to construction.

The item in the last column \$61,813.19, represents the rent paid by the plaintiff for the last twenty-six days of June, and had no relation to the surplus of the defendant on June 6.



The only item, therefore, which should be added to the book surplus on June 1,	\$732,055.73
Is the passenger receipts of	65,846.03

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Making total book surplus of June 6,	\$797,901.76
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On Exhibit 56, under the main heading "credits" are four columns. It appears without dispute that the first three of those columns headed "interest", "taxes" and "operation" relate to the accrued obligations and liabilities of the defendant on these several accounts on June 6, 1893. Some of the items were not adjusted until later, but they were all obligations on that date.

The total of these three columns is,	\$312,517.99
The actual book surplus on June 6 there-	
fore was the sum of,	\$797,901.76
less the accrued liabilities,	312,517.99

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	\$485,383.77
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This, therefore, is the figure which should be used in determining the amount which the defendant had the right to retain out of its moneys, credits and securities under Article IV of the lease, if such moneys, credits and securities were sufficient for that purpose after paying its obligations and liabilities. But the yellow sheet went farther than this by attempting to show how much of the so-called surplus was on hand on August 15, 1894.

To determine this there should be added to the actual book surplus on June 6, namely,	\$485,383.77
the four small items under the head of direct charges amount to,	134.57
the items under the head of "miscellaneous,"	3,760.38
the interest item of	275.00
and the rental in the last column,	61,813.19

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making a total of,	\$551,366.91
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But the defendant in June, 1893, and  
 March, 1894, paid itself dividends  
 out of its surplus, the fourth  
 column under the head of "credits," 480,000.00

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leaving its actual surplus on August  
 15, '94, \$ 71,366.91

instead of the sum of \$582,594.59 charged to the  
 defendant on this yellow sheet.

Because as appears from the journal entry, the  
 defendant assumed that it had the right to have  
 this manufactured surplus of \$582,594.59 in cash  
 on June 6, 1893, an assumption absolutely without  
 foundation, the officers of the defendant charged on  
 this yellow sheet interest on that amount from  
 June 6, 1893, to August 15, 1894, \$41,655.41, which  
 constitutes the last entry on Exhibit E of defend-  
 ant's bill of particulars. By adding this interest  
 to the alleged surplus a total of \$624,250 was made.

This item of \$41,655.41 is a good example of the  
 outrageous character of defendant's actions. This  
 is alleged to be interest on the fictitious surplus from  
 June 6, 1893. In fact, the defendant had in its  
 hands from October 1st, 1893, to August 15th, 1894,  
 proceeds of the \$6,000,000 in excess of disbursements  
 by nearly \$2,000,000. On the money it borrowed it  
 made the plaintiff pay interest. So that in fact de-  
 fendant was never for a minute without all its sur-  
 plus, and having it in bank where it drew interest,  
 compelled plaintiff to pay interest the same amount.

In the middle of this yellow sheet we find a set of  
 figures aggregating \$647,036.44. This total is made  
 up of \$347,036.44, alleged direct obligations for con-  
 struction of the defendant, and \$300,000 of loans,  
 and as applicable to these obligations this yellow  
 sheet sets aside \$50,000 of cash and \$250,000 worth  
 of bonds which it had on hand, leaving its net direct  
 obligations \$347,036.44. It allotted the remainder  
 of the cash on hand, namely, \$63,338.06 and certain

other quick assets to its surplus, making a total applicable to its surplus of \$315,909.65, and by subtracting this from the total of the surplus which it had figured out and the interest thereon, it left a net result of \$308,340.35, for which it compelled the Heights to give its note as set out in the tripartite agreement.

As heretofore shown, the surplus to which the defendant was actually entitled on August 15, 1894, under the terms of the lease, could not have exceeded \$71,366.91, and as it says it had on hand assets applicable to surplus to the amount of \$315,909.65, it certainly had in its hands applicable to conversion purposes or to the payment of the expenditures of the defendant on that date for conversion purposes the sum of \$244,532.74.

Under the tripartite agreement also, Section IV, the Brooklyn City agreed to loan to the Heights \$347,036.44, and under paragraph XII an agreement was made that this loan should be applied to the direct construction obligations of the Brooklyn City. In fact two notes were made, one for \$250,000 and one for \$100,000, making a total of \$350,000. The money thereon was advanced to the plaintiff by the defendant, and these notes were afterwards paid by the plaintiff and all of the so-called direct obligations were discharged by the plaintiff.

The net result of this particular operation was that the defendant loaned the plaintiff \$350,000, which the plaintiff expended on the defendant's property, the plaintiff afterwards repaying the amount to the defendant. The result was just the same as if no loan had been made, and the plaintiff had expended \$350,000 of its own money on the property. Notwithstanding this fact, the defendant in its bill of particulars has set up as an advance, Exhibit F, this \$350,000. It has seen fit in its bill of particulars to ignore the fact that the \$350,000 was repaid to it, and its attempt to get credit for this \$350,000 is on a par with the rest of its bookkeeping.

**Detailed discussion of Point II showing that the plaintiff expended more than \$2,000,000 in conversion of defendant's railroad under the lease in excess of all amounts advanced by the defendant out of the \$6,000,000 fund.**

The defendant demanded a bill of particulars of the expenditures made by the plaintiff under the lease, and this bill of particulars is in evidence.

The defendant refused to admit that the plaintiff had expended any money whatever, and the plaintiff was compelled to expend a great amount of time and labor in introducing the various vouchers, pay-rolls and books of account, and in calling an army of witnesses to testify that the material and labor were furnished and used in conversion and that the bills therefor were paid by the plaintiff.

As to part of its expenditures, the plaintiff introduced certain certificates which had been approved by the officers of the defendant as covering conversion and construction expenditures by the plaintiff. These certificates were of two kinds: First, a certificate, Exhibit 2, covering the plaintiff's expenditures from June 6, 1893, to September 30, 1893, and a certificate, Exhibit 4, covering similar expenditures from October 1, 1893, to December 31, 1893. The second series of certificates was executed under the authority of the tripartite agreement of August 15, 1894, and covered similar expenditures in part prior to August 15, 1894, and in part thereafter. There were two periods, one from January 1, 1894, down to the time covered by the first disbursing committee certificate, and the other after the disbursing committee had ceased its functions, during which expenditures were made by the plaintiff, which were not evidenced by any

executed certificate, and these expenditures were listed in two papers introduced in evidence as Exhibits 1162 and 1163, and detailed proof was given by the plaintiff as to all of the expenditures covered by those two exhibits. Plaintiff expects that defendant will not dispute the fact that over \$2,200,000 was expended in accordance with the terms of the lease upon defendant's railroad in excess of all amounts advanced by the defendant. It is, therefore, not necessary to enter into a detailed discussion of the enormous mass of evidence introduced upon this subject, but the proof may be summarized in a general way as follows:

Total of Exhibit 2	\$1,943,118.09
Total of Exhibit 4	2,020,040.38
(after deducting balance carried forward into this certificate from Exhibit 2)	
Certificate "A" Exhibit 1119	18,291.01
" " "B" " 1120	55,747.87
" " "C" " 1121	25,471.46
" " "D" " 1122	52,856.60
" " "E" " 1123	408,156.04
" " "F" " 1124	25,000.00
" " "G" " 1125	13,791.84
" " "H" " 1126	32,569.00
" " "I" " 1127	4,026.87
" " "J" " 1128	47,759.51
" " "K" " 1129	199,428.06
" " "L" " 1130	27,625.00
" " "M" " 1131	55,081.41
" " "N" " 1132	10,986.92
" " "O" " 1133	17,648.96
" " "P" " 1134	15,654.75
" " "Q" " 1135	8,772.69
" " "R" " 1136	10,000.00
" " "S" " 1137	29,892.87



"	"T"	"	1138	4,279.90
"	"U"	"	1139	7,871.37
"	"V"	"	1140	10,275.06
"	"W"	"	1141	13,185.96
"	"X"	"	1142	10,662.33
"	"Y"	"	1143	19,326.96
"	"Z"	"	1144	4,148.27
"	"A' "	"	1145	6,690.93
"	"B' "	"	1146	6,742.25
"	"C' "	"	1147	5,492.58
"	"D' "	"	1148	11,674.99
"	"E' "	"	1149	583.62
"	"F' "	"	1150	5,615.33
"	"G' "	"	1151	3,201.61
"	"H' "	"	1152	13,828.90
"	"I' "	"	1153	9,325.26
"	"J' "	"	1154	6,786.15
"	"K' "	"	1155	8,770.04
"	"L' "	"	1156	33,035.87
"	"M' "	"	1157	5,349.24
"	"N' "	"	1158	29,258.52
"	"O' "	"	1159	6,211.96
"	"P' "	"	1160	29,027.47
"	"Q' "	"	1161	10,440.18
Total of certificates certified by of-				
ficers of defendant				\$5,234,205.07
Exhibit 1162, according to proof (less				
payrolls included in Ex. 1123)				1,501,124.28
Exhibit 1163				137,373.37
Total				\$6,872,702.62
From this also should be deducted (p.				
2825), certain items in Exhibit				
1163, which are duplicates of cer-				
tain items on the certificates listed				
above. A total of these duplicated				
items is \$3,621.31. This leaves the				
gross amount expended by the plain-				
tiff in accordance with the proof				
				\$6,869,081.31

From this should be deducted sundry credits from sale of old material, etc.	314,013.62
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\$6,555.077.69

In addition to which it paid over to the defendant for construction purposes	\$308,340.35
And interest thereon	16,136.46

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Making the total payments by the plaintiff on account of conversion under the lease	\$6,879,554.40
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Of this amount the plaintiff received from the defendant applicable thereto (See Schedule E of defendant's bill of particulars) less the last three items and parts of two small vouchers	4,552,566.08
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Leaving the amount expended by the plaintiff over and above all amounts received from the defendant	2,326,988.32
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To this should be added expenditures a/c Disbursing Committee	59,516.51
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\$2,386,504.83

This amount is about \$600,000 in excess of the amount wrongfully retained by the plaintiff out of its conversion funds (see p. 76 of this brief).

If therefore, as to some of the vouchers or other items proven by the plaintiff, the proof should be thought not sufficiently complete, yet such items are so few in number and of so small amount, that the net result cannot possibly be affected. The defendant, therefore, owed the plaintiff \$1,740,258.38 on ~~December 31, 1893,~~ <sup>September 16, 1894.</sup> and is entitled to recover that sum from the defendant with interest at 6%.

The evidence of witnesses called with respect to the vouchers and transfers on plaintiff's bill of

particulars which were not included in the certificates, commences at page 955 of the record, and continues practically without interruption to page 2420. It appeared that practically all of the book-keeping with relation to this construction work and the payment of checks, was in the hands of Mr. Alfred A. Noble. He had charge under the supervision of Mr. Lewis of determining whether any particular voucher should be charged to construction or equipment, and testifies in many places (as at pp. 1972, 2158, 2164, 2343, 2416, 2419), that the charges made on the defendant's books for conversion and construction purposes, represented conversion and construction expenditures, as distinguished from operation.

Mr. Lewis (p. 3326) had general charge of the division between construction and conversion, and stated that the construction accounts were correctly kept to show the amount expended on conversion and the amounts expended on operation (pp. 3279-3326).

At pages 2164-5, is the statement that Exhibits 1162 and 1163 contained only items taken from the plaintiff's bill of particulars, and contained no items found in either Exhibits 2 or 4, or in Exhibits 1119-61. This statement should be amended to the extent of \$3,621.31 (p. 2825), and by the amount of construction payrolls in Exhibit 1123, \$113,851.07.

The defendant set up in its answer as a defense that the plaintiff was not the owner of the cause of action sued upon, and it is inferred from the character of some of the evidence introduced by the defendant, that the defendant bases this claim upon the fact that certain entries on the defendant's books show that Brooklyn Rapid Transit Company is the creditor of the plaintiff to an amount approximately the same as the amount expended by the plaintiff.

In another part of this brief, the facts relating to the ownership of this claim are set out in detail, and it is conclusively shown that while the plaintiff has borrowed money for construction purposes from the Brooklyn Rapid Transit Company, the plaintiff has at all times remained the owner of this claim for damages. The defendant has also attempted to make some distinction between moneys advanced for construction purposes by the plaintiff out of its own funds, and payments made by the disbursing committee under the tripartite agreement out of the moneys received from the proceeds of the collateral trust notes which were executed by the plaintiff and the Long Island Traction Company. It is admitted in the case that the plaintiff paid these notes, and that fact is also proven by other evidence. It appears that in fact the disbursing committee paid directly to creditors of the plaintiff for construction purposes \$579,606.04 (p. 7488), and paid directly to the Brooklyn Heights Company \$276,984.53.

Assuming that the plaintiff borrowed money with which to make construction expenditures upon the defendant's railroad, and in connection with the Long Island Traction Company gave its notes for the amount so borrowed, and afterwards paid the notes, the proceeds being disbursed through an agency appointed by both plaintiff and defendant, it is impossible to see how this fact could in any way affect the right of the plaintiff to recover in this action. If we borrow money at a bank with which to prosecute the work under a contract, and afterwards pay our note at the bank, how could that fact possibly be a defense to our cause of action to recover the contract price for the work performed? That is exactly the situation in this case. Therefore, whether the plaintiff borrowed and expended through the disbursing committee all of its construction funds, or only part of such funds, it is

wholly immaterial, and it is useless to enter into a minute discussion of the evidence upon that subject. In fact in the record (p. 7346), it is conceded by both sides that the Brooklyn City Construction account in the Brooklyn Heights ledger showing a balance on January 1, 1896, of \$2,381,946.14, is an account of the expenditures made by the Brooklyn Heights Railroad Company on account of the conversion and construction of the Brooklyn City Railroads.



**Detailed discussion of Point III showing that defendant was not entitled to charge against the \$6,000,000 fund any construction or conversion expenditures for labor performed or material furnished prior to June 6, 1893, and that the alleged oral agreement to the contrary was void, if made.**

*(a) The entire history of the transaction demonstrates that the \$6,000,000 was to be paid out only for conversion expenditures of the plaintiff after June 6.*

The plaintiff and defendant were both street railroad corporations, owning and operating street railroads in the City of Brooklyn. In the year 1891 the defendant had commenced actively the work of converting its extensive system of horse railroads into electric railroads. It had then outstanding capital stock of \$6,000,000, and a mortgage debt including mortgage on subsidiary corporations theretofore merged into it, of \$3,925,000. To meet the cost of converting its railroads into electric railroads, the stockholders in 1892 duly authorized the increase of its capital stock from \$6,000,000 to \$12,000,000, and it duly authorized the creation of a mortgage securing \$6,000,000 par value of bonds, \$3,000,000 par of which had been issued prior to December, 1892. In the latter part of 1892, the stock of the defendant was worth approximately 150 in the market, and in December, 1892, and January, 1893, the defendant issued to its stockholders at par, \$3,000,000 of the authorized increase of capital stock, thereby in effect giving to its then stockholders a dividend of \$1,500,000 or approxi-

mately 25% upon the outstanding capital of the corporation. The \$3,000,000 thus received had been in part expended for the purposes of conversion, and in part remained on hand in cash on February 14th, 1893.

On December 12, 1892, a proposition was made to the directors of the defendant by the firm of Hollins & Company, representing a so-called syndicate, which was accepted by the Board of Directors, subject to the approval of stockholders. On January 6, 1893 (Exhibit 53, p. 3199), the defendant issued a circular to its stockholders outlining the proposition so made. This proposition, in brief, provided:

1. Execution of a lease of the property of the defendant to a street surface railroad company for 999 years, and a guaranty of 10% dividends secured by a deposit of \$4,000,000 as a guaranty fund.

2. The syndicate was to offer to the Brooklyn City stockholders, the right to purchase at fifteen dollars per share, three shares of Traction Company stock of the par value of \$100 each for every ten shares of the par value of \$10 each held by the stockholders in Brooklyn City Railroad Company at the date of the delivery of the lease.

3. The capital stock of the Traction Company was to be fixed at \$30,000,000. Of this total, \$27,000,000 was to be subject to subscription by Brooklyn City shareholders, and \$3,000,000 was to be subscribed by the syndicate at the same rate.

4. The right to subscribe for the unissued \$3,000,000 of capital stock of the Brooklyn City was to remain with the stockholders of the Brooklyn City, "and will no doubt be issued to them at par during the year 1893."

5. The surplus in the treasury of the Brooklyn City Railroad Company at the date of the delivery of the lease will be divided in due time among the stockholders.

6. Rights to purchase stock of the Traction Company and to subscribe to the unissued stock of the Brooklyn City were to be arranged so that such rights could be sold.

7. The right to purchase the stock of the Traction Company was to remain open for sixty days after the lease was ratified by the stockholders of the Brooklyn City.

8. The proposed lease was to be laid before the stockholders for ratification at a meeting to be held on February 15, 1893, notice of which accompanied the circular.

It will be noted that by this proposition, subscriptions to the traction stock could not mature until at least sixty days after February 15, 1893. It also appears that the only source from which the guaranty fund of \$4,000,000 could be raised, was the payment by subscribers for the Long Island Traction stock (fol. 3270). In compliance with this notice, the stockholders of the defendant met on February 15, 1893, and duly approved the lease presented to them which was afterwards executed.

This lease provided in Article XLVII that it should be delivered to the lessee at such time and upon such terms and conditions as should be agreed upon by the Boards of Directors of the two Companies, but notwithstanding such approval and delivery, it should not go into effect, nor should the lessee be entitled to possession of the premises until the \$4,000,000 should have been actually deposited either in cash or securities pursuant to the terms of the lease, and a certificate endorsed upon the lease that such \$4,000,000 had been deposited.

All that was accomplished by the approval of the stockholders therefore was their consent that a lease might be made of the property at some future date when the \$4,000,000 was deposited.

On the same day, February 15th, one Markey obtained an order to show cause returnable February 18th (p. 7239, Exhibit 1452), restraining the Brooklyn City from delivering possession of the demised property to the lessee until the argument and decision of the motion. Apparently the motion was never argued, nor any attempt made by anybody to have the injunction dissolved, until May 19, 1893, when an agreement was made between Hollins & Co. and Flynn (Exhibit 1454, p. 3226), providing for the immediate dissolution of the injunction.

On February 14 the defendant had on hand in cash unexpended proceeds of the sale of its first \$3,000,000 of capital stock amounting to at least \$500,345.35 (Defendant's evidence, p. 7329).

April 6, 1893 (pp. 147, 3330), the defendant's directors approved the form of a contract for the delivery of the lease stating the terms and conditions. A similar resolution was adopted by the directors of the Heights. This resolution was made in conformity with the provisions of Article XLVII of the lease, which provided that the lease should be delivered at such time and upon such terms and conditions as should be agreed upon by the Boards of Directors (pp. 136-144-3330).

The proposed agreement so approved, fixed April 17, 1893, as the date for the delivery of the lease under the following terms and conditions:

1. Deposit with the New York Guaranty and Indemnity Company of 270,000 shares of Long Island Traction Co.

2. The offer to each of the persons who are stockholders of the defendant on April 17th, of the op-

tion for *sixty days thereafter* to purchase three shares of Traction stock together with the right to assign such option.

3. Notwithstanding the delivery and acceptance of the lease, it should *not go into effect*, nor should the plaintiff enter into possession until the \$4,000,000 had been actually deposited and a certificate to that effect attached to the lease.

4. Possession should not be delivered until the Markey injunction was dissolved.

5. Possession should not be delivered until an inventory of the personal property to be delivered had been agreed upon.

This agreement dated April 17, 1893 was actually executed by the two corporations (p. 235, Exhibit 8), and the lease delivered. The lease thereupon became a contract between the parties, to go into effect when the \$4,000,000 guaranty fund should be deposited.

As part of the scheme for floating the Traction Company stock and obtaining the \$4,000,000 with which to form the guaranty fund, one Lawrence made an offer in writing to the Traction Company (p. 222, Exhibit 5), to the effect that,

(1) He would purchase the entire \$30,000,000 capital of the Traction Company by paying \$4,000,000 in cash to form the proposed guaranty fund under the lease, such payment to be made simultaneously with the delivery of possession of the leased property.

(2) He would transfer to the Traction Company the entire capital stock of the plaintiff, par value \$200,000.

(3) He would procure an agreement between the Traction Company and the Heights to the effect



that all the net earnings of the Heights, after paying ten per cent. upon its capital stock, should belong to the Traction Company.

(4) He would pay to the Heights so much as might remain out of a fund of \$500,000 after paying expenses.

The Traction Committee under date of April 7, 1893, reported to the Traction Company directors (Exhibit 6, p. 225), the substance of the offer. In this report the Committee say (p. 228), that they had conferred with the New York Guaranty and Indemnity Company, and had ascertained that arrangements had been made with that Company by which there is every reasonable expectation that the necessary \$4,000,000 will be paid in to the designated Trust Companies *upon the taking of possession* of the leased property of the Brooklyn City Railroad Company by the Brooklyn Heights Railroad Company. They therefore recommended the acceptance of the offer, and submitted an agreement between the Traction Company and the Heights in accordance with such offer (Exhibit 7, p. 230).

This agreement between the Traction Company and the Heights provided in effect that the \$4,000,000 guaranty fund should be paid over by the Traction Company, and that if at any time such \$4,000,000 fund should no longer be subject to the terms of the lease, then it should be paid over to the Traction Company. The agreement further provided that the entire net income of the Heights should belong to the Traction Company.

Further carrying out the proposed program, the Traction Company, the New York Guaranty and Indemnity Company and Lawrence entered into an agreement dated April 7, 1893 (Exhibit 8, p. 235), providing for the issue of the entire \$30,000,000 capital stock of the Traction Company, its deposit

with the New York Guaranty and Indemnity Company, the deposit of the entire stock of the Heights with the same Company, the execution of the contract (Exhibit 7), between the Traction Company and the Heights, and its deposit in escrow with the Guaranty Company, and provided further that unless the Heights accepted possession under the lease *within one hundred days from April 7, 1893*, then stock should be returned to the several owners.

Further carrying out the proposed scheme, the New York Guaranty and Indemnity Company on April 10, 1893, sent a circular (Exhibit 9, p. 244), to the stockholders of the defendant, offering each stockholder the right *within sixty days from April 17, 1893*, to take three shares of Traction stock at Fifteen dollars per share for every ten shares of Brooklyn City stock owned by such stockholders on April 17th; providing also for the right to assign such subscription right.

The next step in the transaction was the agreement with reference to the dissolution of the Markey injunction made May 19th, 1893 (Exhibit 1454, p. 3226).

Under the set of agreements and circulars heretofore outlined, the subscriptions to the Traction Company stock out of which was to be raised the \$4,000,000 guaranty fund, became due at the latest on June 15, 1893. We find, however, on June 6, 1893 (p. 271), the \$4,000,000 fund was deposited with the Guaranty Company, the proper certificates to that effect endorsed upon the lease, and possession delivered under the lease so that the lease went into effect.

The only change in the program was that by a resolution of June 6, 1893 (p. 273), the provision of April 17, 1893, making the taking of the inventory a condition precedent to delivery of possession, was abrogated.

On June 6, 1893, the plaintiff commenced paying all bills for operating expenses and received all the earnings accruing after that date, and from that date down to the time of the trial, has made all the payments to the defendant provided by the lease, including interest upon its bonded debt, and quarterly payments at the rate of 10 per cent. per annum upon the outstanding capital stock of the defendant. After June 6, 1893, the defendant paid certain construction and other liabilities which it had incurred prior to June 6, 1893. It also paid its operating expenses accrued prior to that date, and the accrued taxes and interest under the provisions of the lease.

The construction pay rolls of the week in which June 6 occurred, were divided as of that date, and separate vouchers made for the two portions of the week (p. 332). Some construction vouchers for material running the entire month of June were divided, defendant paying the portion accruing before June 6 (pp. 338-400). Generally speaking, the defendant paid all construction expenses accruing up to June 6, and the plaintiff all accruing thereafter.

As shown in the statement, all parties to the transaction knew when the lease was first proposed, and at all subsequent dates, that the \$4,000,000 fund was not to be deposited, and the lease would not take effect until some day in June. If able to read plain English, they all knew that the lease required the defendant to turn the road over on that date free from any obligations except those specifically mentioned, and to expend the proceeds of the stock and bonds for conversion purposes accrued subsequent to June 6th.

The Markey injunction certainly had nothing to do with the delay in taking effect of the lease. In the first place the order to show cause was returnable on February 18, three days after the lease was

approved by the stockholders, but no effort whatever was made by the defendant to have it vacated. The lease had been almost unanimously approved by the stockholders of both companies and the injunction should have been argued and dissolved on February 18th. In fact, the defendant had in its hands on May 18th an agreement by Flynn to vacate the injunction. There is no evidence that this agreement could not have been procured the day the injunction was served, or at any time thereafter. Since under the provisions of the issue of the Long Island Traction stock and the requirement as to the deposit of the guaranty fund, the lease could not take effect until some time in June, the fact that the agreement to vacate temporary injunction in the Markey action was not received until the 18th of May had no possible bearing upon the delay in the taking effect of the lease.

The entire history shows, therefore, that with or without the Markey injunction all parties knew at all times that the \$4,000,000 could not be deposited, the lease could not go into effect, and could not become a binding contract until after June 1st, 1893.

*(b) The lease absolutely forbids the payment out of the \$6,000,000 fund of any expenditures prior to June 6, 1893.*

The first provision of the lease requiring consideration is Article XLVI, reading as follows:

“XLVII. It is mutually covenanted and agreed between the lessor and lessee that this lease shall not be binding or valid as to either of the parties hereto until approved by the vote of the stockholders of the lessor and lessee as required by law, and that if so approved this lease shall be delivered to the lessee at such time and upon such terms and conditions as shall be agreed upon by the Boards of Directors of said lessor and lessee, but notwithstanding such approval and delivery, *this lease shall*

*not go into effect* nor shall the lessee be entitled to enter into possession of the premises and property by this lease demised until said four million dollars (\$4,000,000) shall have been actually deposited either in cash or in securities, or both, pursuant to the terms of this lease, with said Brooklyn Trust Company or such companies, and a certificate to that effect is endorsed hereon or attached hereto, which certificate shall be duly executed by said Trust Company or companies under its or their corporate seals, and shall state that said four million dollars (\$4,000,000), or such portion thereof as they respectively hold, is held upon the trust and subject to the terms, covenants and stipulations and conditions in this lease contained with respect thereto."

Under this provision there were three successive stages, first, the lease should not become "binding or valid" until approved by the stockholders of the two companies. This approval was received on February 14, 1893, as above recited. The next stage was its delivery, and this paragraph provided that it should be delivered "at such time and upon such terms and conditions as shall be agreed upon by the Boards of Directors." This date was fixed as shown above, as April 17, 1893, and in the agreement providing for such delivery it was again provided as it is in paragraph XLVII, that the lease should not go into effect until the deposit of the \$4,000,000 fund. As shown above, the \$4,000,000 fund was actually deposited on June 6, 1893, and the lessee went into possession on that date.

The history of the transaction shows that it was never anticipated by either party to the lease that the \$4,000,000 fund should be deposited, or that the lease should become effective until the payment of the subscriptions by the subscribers to Traction Company stock. By the circular of January 6, this could not occur until sixty days from February 15th, and by the circular of April 6th could not



occur until one hundred days from April 17th. There was, therefore, never a day from the first proposition to the Board of Directors of the Brooklyn City on December 12, 1892, down to June 6, 1893, when any of the parties concerned did not know that the lease could not take effect and possession could not be taken under the lease until some time in June.

The lease provided in Paragraph IV as follows:

“IV: The lessor further covenants and agrees that all moneys, credits or securities on hand *at the date this lease shall take effect*, less the amount required to pay and discharge the indebtedness, obligations and liabilities of the lessor *as of that date* other than its bonded indebtedness upon bonds issued or assumed by it, and less the amount of its surplus earnings diminished by a *pro rata* amount of accrued interest and accrued rentals agreed to be paid by the lessor and a *pro rata* amount of taxes for the current year estimated upon the amount of the taxes for the preceding year, shall be used, applied and expended by the lessor in payment, at the request of the lessee, from time to time, of the cost of converting the railroads of the lessor into an electric railroad, or into any other kind of railroad authorized by law, which shall be approved of by the lessor and lessee, and if said moneys, credits and securities be not required for such purpose, then they shall be expended in the payment as aforesaid of the cost of additions, improvements, extensions, branches and equipments of the said railroads and properties of the lessor, other than those necessary to keep said railroads and properties in good condition and repair and other than those necessary to preserve or secure efficiency in the operation of said railroad or railroads. Provided, however, that the lessor shall pay and discharge its said indebtedness other than its bonded indebtedness and its liabilities assumed by the lessee, *as of the date when this lease shall take effect*, and also the

said *pro rata* amount of accrued interest upon its said bonded indebtedness and of its rentals and shall pay over to the lessee upon demand the said *pro rata* amount of taxes for the current year, estimated as aforesaid."

In this paragraph, no exception was made with respect to any construction liabilities of the defendant that might be outstanding on the date the lease takes effect, but the defendant contracted absolutely and positively to discharge all its indebtedness, obligations and liabilities as of that date other than its bonded indebtedness. The first part of this paragraph IV contains the agreement that the defendant will devote the monies, credits and securities on hand at the date the lease takes effect, less its obligations and less its surplus, to construction and conversion. In order to make doubly sure, the paragraph provides at the end an express guaranty that the lessor should pay and discharge its said indebtedness, viz: "the indebtedness, obligations and liabilities of the lessor as of that date" other than its bonded indebtedness, and its "liabilities assumed by the lessee" as of the date when this lease shall take effect. The liabilities assumed by the lessee are fixed by paragraph XXXIV as being accrued negligence liabilities. In respect to these, the scheme of the lease was that the lessee should pay all accrued negligence liabilities as of the date the lease takes effect, and should be made whole on this account at the termination of the lease by an adjustment of the negligence liabilities outstanding at that date.

Paragraph XXXIV further emphasizes the obligation of the defendant to pay all of its obligations of every kind at the date the lease takes effect, because in that paragraph the plaintiff assumed and agreed to indemnify the defendant from "the expense of the defense of any and all actions which shall be pending against the lessor on the date this

lease takes effect, or which may be hereafter during the said term or the continuance of this lease, brought against the lessor for injuries to persons or property, or for the death of any person on account of negligence, in the maintenance or operation of said railroad, and from and against *any judgment existing against the lessor upon like causes of action on the date this lease takes effect*, or at any time thereafter during the continuance of this lease.

Unquestionably all rentals accruing up to June 6th became the property of the defendant, as is provided in the following paragraph VIII:

“VIII. The lessor further covenants and agrees that the lessee may collect and receive to its own use all rents falling due, *subsequent to the date this lease takes effect*, under or by virtue of any lease, contract or agreement, except this lease, between the lessor and any person or corporation for the use of the track or tracks of the said railroads or any portion thereof, belonging to the lessor, or for the use or occupation by any person or corporation of any property mentioned in this lease or covered by its terms or intended so to be. And the lessee agrees to account and pay over to the lessor so much of the said rent as shall have accrued prior to the said date.”

The provision for the inventory unquestionably referred to June 6th in paragraph XI:

“XI. The lessor agrees to transfer and deliver to the lessee *at the date this lease shall take effect*, all supplies and materials *then on hand* for use in connection with the construction, maintenance or operation of said railroad, upon payment by said lessee to the lessor of the cost price thereof, which payment the lessee promises and agrees to make upon such transfer and delivery.”

The term of the lease itself, as provided in paragraph XII, is 999 years from "the date this lease takes effect."

In paragraph XVII, the plaintiff agreed to pay all rentals accruing "after the date when this lease takes effect" under the terms of any contract or agreement or lease then existing between the plaintiff and any person or corporation.

By paragraph XXII, the plaintiff covenanted as follows:

"XXII. The lessee further covenants and agrees that it will proceed faithfully and diligently with the work of converting the said railroad and railroads into an electric railroad, or into such other kind of railroads as shall be approved by the lessor and lessee; and that in the event that the *said moneys belonging to the lessor on hand at the date this lease takes effect*, after the deductions aforesaid *and the proceeds of said stock and bonds* of said lessor authorized to be issued, but unissued, shall be insufficient to pay and discharge the cost of converting the said railroad and railroads of the lessor into an electric railroad, or into such other kind of railroad as may be agreed upon by the lessor and lessee, that then and in that event the lessee will forthwith furnish and supply all such sums of money, materials and supplies as may be requisite and necessary for that purpose, and will proceed faithfully and diligently with the work of constructing and converting said railroad and railroads into an electric railroad or such other kind of railroad as may be agreed upon by the lessor and lessee."

In this paragraph is continued the distinction found in paragraphs IV and V between "monies, credits and securities on hand at the date the lease takes effect," and the proceeds of \$3,000,000 stocks and \$3,000,000 bonds.

In paragraph XXVII, the plaintiff covenants at the expiration of the lease, to return and deliver

the railroad, real estate and properties in as good order "as they were at the date this lease takes effect."

From the evidence, it is certain that the \$4,000,000 fund was deposited on June 6, 1893, and a certificate to that effect entered upon the lease, and possession delivered to the plaintiff. On that date, therefore, all the conditions requisite to the taking effect of the lease under the provision of XLVII were complied with, and the lease actually went into effect. As we have seen, paragraph IV required the defendant out of the monies, credits and securities on hand on June 6, to pay all of its debts and obligations as of that date. In the attempt to justify the retention of the amount due the plaintiff, the defendant has alleged in its answer (fol. 32, p. 11 of the printed pleadings), that the only securities on hand at the date of said lease, and at the date said lease took effect, were the \$3,000,000 of stock and \$3,000,000 of bonds, and that the word "securities" in Article IV refers to and includes, and was intended by the parties to said lease to refer to and include, the \$3,000,000 of stock and \$3,000,000 of bonds. That this allegation of the answer is untrue is conclusively proven, first by the provision as to the disposition of the monies, credits and securities in paragraph IV, and by the entirely different disposition to be made of the \$3,000,000 of stock and \$3,000,000 of bonds in paragraph V of the lease, and by the provision contained in paragraph XXII of the lease

"and that in the event that the said monies belonging to the lessor on hand at the date this lease takes effect after the deductions aforesaid, and the proceeds of said stock and bonds of said lessor authorized to be issued, but unissued, shall be insufficient to pay and discharge the costs of converting the said railroad," etc.

The defendant certainly had on hand on June 6, 1893, moneys, credits and securities to the amount



of \$485,026.65 (p. 320), which were covered by Article IV.

In another paragraph of this brief it will be shown that if the defendant's claim that monies, credits and securities in paragraph IV included the stocks and bonds, then the defendant owes the plaintiff more than it would if the words were held not to include the stocks and bonds.

Unless the words "monies, credits and securities" in paragraph IV were intended to include the stocks and bonds, then the defendant was under absolute obligation to pay all of its indebtedness and liabilities on June 6th, including, of course, any liabilities which it may have incurred for either operation or construction purposes, except negligence liabilities.

A study of the lease shows that it was drawn with the utmost care, and with the greatest skill, with the intent to absolutely safeguard every possible right of the defendant. The evidence shows that it was drawn by counsel for the defendant. All parties knew when the lease was proposed in January, when it was voted upon in February, and when it was delivered in April, that it would not take effect until some time in June, regardless of the Markey injunction. If it had been intended that the defendant should retain out of the \$6,000,000 fund either its surplus, or its construction liabilities, or other liabilities incurred prior to the taking effect of the lease, it would have been perfectly easy to so provide in the lease. As this is the defendant's document, it must be construed strictly against the defendant, and whether construed strictly or liberally, the result is the same, viz.: that no provision of the lease authorized the defendant to charge against the \$6,000,000 fund any of its outstanding obligations on June 6, 1893, much less any payments made by it before that date.

*(c) The financial condition of the defendant on June 6, 1893, shows that it was perfectly able to discharge all its construction and other obligations on that date, and that any other method of accounting would be contrary to good business principles and contrary to equity.*

Assuming for the sake of argument, that the defendant is right in alleging that the words "monies, credits and securities on hand on June 6, 1893", included the \$3,000,000 of bonds and \$3,000,000 of stock, the defendant's situation was then as follows:

Of course it was under obligation to realize on the monies, credits and securities on hand the market price. If the stock constituted "securities on hand", it must have been treasury stock and the property of the Company. To such stock the stockholders had no right to subscribe at less than its market value. The proof shows that it could have been readily sold at a premium of at least 62 1/2. The proof shows that the defendant actually realized from the \$3,000,000 of bonds a premium of \$221,903.50 (Deft.'s Ex. 1458). The proof shows without contradiction (fol. 320), that the defendant had on hand on that date miscellaneous monies, credits and securities aggregating \$485,026.65. The proof shows that the defendant had on hand supplies amounting to \$251,335.59 (Deft.'s Ledger 313). The proof shows that the defendant received from the plaintiff for construction purposes, a note of \$308,340.35 and received thereon \$16,136.46 interest (fol. 397), and that the defendant paid operating expenses of the plaintiff, the greater part of which were credited to plaintiff on defendant's books, the sum of \$42,532.84 (fols. 329-331). The defendant either actually or potentially, therefore, on its own theory had on hand applicable to the payment under paragraph IV, of its obliga-

tions, its surplus and conversion purposes, the sum of \$9,216,775.39 tabulated as follows:

*Monies, Credits and Securities on Hand June 6  
Under Defendant's Theory.*

\$3,000,000 bonds and premiums,	\$3,221,903.50
\$3,000,000 stock at 162½,	4,875,000.00
Miscellaneous monies, credits and securities (p. 320),	485,026.65
Supplies,	251,335.59
Received from plaintiff,	324,476.81
Obligations paid by plaintiff,	42,532.84
Proceeds of High Street property,	16,500.00
	<hr/>
	\$9,216,775.39

Out of this sum the plaintiff met the following obligations:

Loans, outstanding June 6th,	\$600,000.00
Accrued operating and construction liabilities, June 6th,*	640,934.09
Advanced to plaintiff,	4,548,820.60
Book surplus, June 6th,**	485,517.81
	<hr/>
	\$6,275,272.50

Leaving available,	\$2,941,502.89
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\*Stipulation, p. 394 and Exhibit 56.

\*\*Exhibit 56, deducting accrued operating expenses and journal entries, and including passenger receipts after June 1.

If the defendant's contention is right, it therefore had on hand on June 6th and received thereafter cash resources sufficient to pay all of its obligations, all of its actual surplus, all the money actually advanced to plaintiff, and enough in addition to pay plaintiff \$2,941,502.89 for its subsequent expenditures upon defendant's railroad.

*(d) Defendant's actual disposition of proceeds of real estate sold between February 14 and June 6 show that it is not entitled to credit for expenditures between those dates.*

Between February 14 and June 6 the defendant sold two parcels of real estate for \$165,500 and did not, either on its books of account or in its bill of particulars, devote this amount to conversion, but on the contrary treated it exactly as if the lease had not been executed on February 14, and exactly as if the plaintiff had nothing to do with defendant's receipts or expenditures for any purpose whatever prior to June 6. This fact conclusively negatives defendant's claim that it was entitled to credit for its conversion expenditures after February 14, and conclusively negatives the existence of the alleged oral agreement between Lewis and Hollins & Company, with reference to construction expenditures after February 14.

Article XLV of the lease provides:

"That if the continued use of any real estate included in or covered by the terms of this lease, shall not be necessary or required for the maintenance or operation of said railroad or railroads, extensions or branches, then in that event the lessor with the consent in writing of the lessee may sell and dispose of said real estate, and the proceeds therefrom shall be expended by the lessor for the same purpose as in this lease provided for the expenditure of the proceeds of the stock and bonds of the lessor."

Defendant has admitted upon the record that on March 24, 1893, it sold a parcel of real estate on Sands Street for \$150,000 (p. 2133), and afterwards collected interest on this amount of \$10,458.26 (p. 2144).

It also appears (see Ex. 1457 and entry upon defendant's journal under date of April 16, 1893,

and July 5, 1893), that the defendant sold a parcel on High Street for \$16,500 about April 14, 1893. Of the amounts so collected (see p. 2145) \$50,444.63 was carried to defendant's surplus account for distribution among its stockholders and \$126,513.63 was credited to real estate, but appears in defendant's accounting on the trial as part of the assets out of which it assumed to pay itself its manufactured surplus.

If the lease went into effect on February 14, or if the plaintiff was chargeable with construction expenditures after that date, then the entire amount of these two sales should have gone into the construction fund.

If the alleged oral agreement between Hollins & Company and Lewis had actually been made and had been binding upon the parties, this total would have been devoted to construction purposes under the lease. We find, however, that the defendant did not at any time regard this money as received by it under the provisions of Article XLV of the lease above quoted, and that it never pretended to account for this sum until in producing its Exhibit 1457 it attempts to account for \$126,513.63 of the entire amount, still reserving, however, \$50,444.63 as part of its surplus. Nothing in Article XLV or in any other part of the lease can possibly be construed as permitting the defendant to keep out of the proceeds of real estate sold any part as alleged profits for its stockholders.

The defendant therefore is in the position of claiming that the lease was in effect for all purposes which would reduce the construction fund and increase the surplus of the defendant on February 14, but was not in effect for any purpose or in accord with any provisions of the lease which would impose upon the defendant any obligation to expend money on property leased.



(c) *The alleged oral request that the defendant continue construction after February 15th at plaintiff's expense, if made, was wholly without effect.*

The defendant offered certain testimony, which it claims tended to show an agreement that the expense incurred in conversion and construction during the pendency of the Markey injunction should be retained out of the Six million dollars, the proceeds of the stock and bonds in question. This alleged contract consisted of certain conversations between Mr. Hollins, Mr. Burke, his partner, on the one hand, and Mr. Lewis, on the other hand. Hollins and Company owned or controlled at that time the capital stock of the plaintiff, and were the promoters of the Long Island Traction scheme of capitalization, and Mr. Lewis was at that time the president of the defendant.

If the dim recollection of Burke, Hollins and Lewis were accurate, then this oral agreement was an agreement to release the defendant from the obligations contained in Article IV of the lease, that it would itself pay out of its own funds, all of its obligations (except its personal injury obligations), on the date that the lease took effect.

On the day the lease was approved, a preliminary injunction was granted to one Joseph Markey in an action brought by him as a stockholder of the Brooklyn City Railroad Company to enjoin the carrying out of the lease. As we have shown elsewhere, although the lease was approved and executed by the officers of the respective companies on the 14th of February, it was not in fact delivered until the 17th of April. Therefore, on the date of these alleged conversations there was no binding contract in existence between the parties. All of the alleged conversations, according to the testimony, took place on the day that the preliminary injunction was granted, or im-

mediately thereafter, and long prior to the 17th of April. The lease itself, in terms, provides how and when the proceeds of the stock and bonds shall be expended.

The firm of Hollins & Co. which made the original proposition to the directors of the Brooklyn City, acquired title to the stock of the plaintiff early in 1893 (p. 3194), and this firm was at the same time the owner of a large block of stock of the defendant (fol. 3266).

In January, 1893 (p. 3494), the existing Board of Directors of the plaintiff was changed by adding Haven, son of one of the trustees of the Mutual Life, Timpson, one of the officers of the Mutual Life, and Peabody, a son-in-law of Mr. Haven. The Mutual Life was at all times a large holder of stock of the defendant (p. 3529).

On April 10 (p. 244, Exhibit 9), the Guaranty Company offered the Brooklyn City stockholders the right for sixty days to subscribe for stock of the Traction Company, and provided for the salability of such subscription rights. These rights were largely dealt in on the Street before the issue of the traction stock (fol. 3394).

Defendant has not claimed that any arrangement was entered into between the officers or directors of the plaintiff and those of the defendant. It has claimed that there was some conversation between the persons who then owned the stock of the plaintiff and the president of the defendant. There is nothing in the records of the plaintiff-company even now to show that these alleged owners of the stock had any connection with the company. The proposition to the defendant for a lease came from the New York Guaranty and Indemnity Company (see page 3198). But aside from that fact, the conversations themselves do not bear out the claim that is now made, nor do they establish any understanding or agreement

which in any way tallies with what was admittedly attempted to be done by the defendant.

At page 3220, Mr. Burke, a partner of Mr. Hollins, testified that either he or Mr. Hollins asked Mr. Lewis (the then president of the defendant), to proceed with the reconstruction work, but, on page 3222, when asked whether he could give any further details as to the interview answered: "No, I don't recollect any other details."

On page 3224, he finally testified that the substance of the interview was that the work be proceeded with by the city railway people out of the funds which were to come to us, to use his language. What those funds were he didn't define, but he did identify (at p. 3226), Plaintiff's Exhibit 1454, the stipulation for the dissolution of the Markey injunction.

Mr. Lewis, being examined about this conversation with Mr. Hollins, testified as follows (at p. 3240):

"He said to me among other things that he regretted this injunction, and that steps would have to be taken to protect the interests of both parties. He stated that it is desirable to proceed with the work; he and I then stated, as men will on occasions of that kind, that it would be necessary, in order to continue this work, to use the funds of the Brooklyn City Railway Company to be expended for the purpose, whether such funds were those then on hand or properly any other funds which might accumulate either from the earnings of the company or the proceeds of the bonds and stock to be sold by the Brooklyn City Railroad Company, as referred to in the lease, until possession under the lease could be effected."

We do not see how it can fairly be claimed that that conversation constituted a request that the work be continued and paid out of the \$6,000,000 of stock and bonds to be realized after the delivery

of the lease. But the testimony in the case is undisputed, that even the City Company never contemplated settling the rights of the parties upon the basis of any such conversation or understanding, nor does the answer or the bill of particulars disclose that any figures were ever made upon such basis, but it is now attempted to charge all the expenditures after the 14th of February to the Six-million-dollar fund without devoting to such expenditures the earnings or the funds on hand or any other funds of the defendant company, as stated in Mr. Lewis' testimony.

At page 3245 Mr. Hollins was asked as to the substance of his conversation with Mr. Lewis upon this subject, and we quote from the record:

"A. It was that I talked it over with Mr. Lewis and urged that the work proceed and that it was most important, and we recognized— (Referee: What did he say?) A. He said that it was unquestionably desirable that the work proceed, that we had already electrified a certain amount of the lines, and, of course, the results were very apparent what it would be on the whole system, and every hour's delay meant a loss of thousands and thousands of dollars to us."

At page 3258 Mr. Hollins testified, in substance, that he called Mr. Lewis' attention to the connection his firm had had with other traction companies where the motive power had been changed from horse to electricity, and gave him the comparative percentage of increase, and, showing him the advantage of having the work proceed as quickly as possible, urged Mr. Lewis to proceed with his contracts as rapidly as he could.

At page 3259, in response to a question of the Referee as to how the expense was to be made, he said:

"A. The Brooklyn City Railway Company were to proceed with the work and receive

credit for the money that they expended in construction \* \* \* in the form of a guarantee under the lease."

Certainly, no one familiar with this case would know what Mr. Hollins meant by that statement.

On cross-examination he was asked (at pages 3260-61) whether he had any accounting with Mr. Lewis to find out what funds the Brooklyn City Company had on hand February 14th, realized from previous sales of stock and bonds. He avoided the question, but finally in response to the Referee said:

"A. If I remember, they would not proceed with the work without having the money on hand in the Brooklyn City Railroad Company necessary to provide the funds, and I presume they were there.

Q. That is all you remember? A. Personally, without refreshing my memory."

At page 3264:

"Q. In this conversation with Mr. Lewis was anything said about using the funds that they had on hand for this work of conversion? A. You mean of construction?

Q. Yes, sir. A. Yes.

Q. They were to use what funds they had on hand—the City Company? A. I hoped that they would. I talked with them a great many times about it. In fact, as far as I remember, we used to come up together on the Long Island train at that time, and I was saying daily that it was very desirable that we should proceed, and it was, in our opinion, the best way of providing the funds in view of this injunction."

At page 3266 it came out that Hollins and Company were stockholders of the Brooklyn City Railroad at the time of this alleged conversation.



At page 3269 Mr. Hollins further testified:

“Q. In your conversation with Mr. Lewis was there anything said by you or by him to the effect that the earnings of the company during this time should be credited to the lessee, or don't you remember about that? A. You mean over and above the rentals?

Q. Over and above the operating expenses pending this work. A. You mean after the lease was entered into?

Q. Yes. A. I think it was.”

And again he testified on the same page:

“It was undoubtedly to the interest of the Brooklyn City Railway that this should proceed just as much as it was to the interest of the Long Island Traction Company, and therefore we did all we could to induce the Brooklyn City people to look at it from that point of view and they eventually did.”

At page 3522, *et seq.*, Mr. Auerbach testified as follows:

“Q. Assuming for the sake of argument that there was in the treasury of the Brooklyn City Company at the date of the ratification of this lease, the 15th of February, certain funds arising from the preceding sales of stock, did this conversation that you testified to go to the extent of relieving the City Company from expending those moneys in conversion? A. Oh, no. \* \* \*

Q. The lease provides that the Brooklyn Company shall pay all of its debts, other than negligence claims and that sort of thing, as they existed at the time the lease takes effect. Was there in that conversation any talk of relieving the Brooklyn City Company from that obligation of the lease? A. No.

Q. The lease became effective on the 6th of June, didn't it? A. Yes, that is my recollection.”

None of the witnesses appeared to have considered on February 15th the question whether the

Brooklyn City did, or did not have on hand funds in its capital account applicable to conversion, and apparently none of them considered the rights of the plaintiff under the terms of the lease.

The evidence with relation to this oral modification of the lease, falls very far short of a contract, both in its substance, and in its method. Hollins and Co., as owners of Brooklyn City stock, were anxious to have the work of conversion proceed because, as their circular shows, they thought it would be a great advantage to the earnings of the Brooklyn City. Lewis, as President of the Brooklyn City, was anxious to proceed with conversion for the same reason. All of their evidence taken together, amounts to no more than the expression of a desire on the part of Hollins & Co. that Lewis, as President of the Brooklyn City, would proceed with the work of conversion. As Lewis correctly states, they could use the funds on hand, or any other funds which might accumulate until possession under the lease could be effected. No provision was made for an accounting of the monies, credits and securities then on hand in the Brooklyn City treasury; no provision was made for the oversight by the Brooklyn Heights of construction; no accounts were kept showing any charge to the Heights of any construction undertaken. The plain provisions of the lease could not be modified by oral agreement between Hollins & Co., who were only stockholders of the Heights, and not officers, and an officer of the defendant,

First, because the terms of the lease had been approved by the requisite vote of stockholders under §78 of the Railroad Law, and the lease could not be changed without a similar vote under proper notice.

See,

*Continental Insurance Co. vs. New York, New Haven and Hartford Railroad*, 187 N. Y., 225.

*Railroad Law*, §78, L. 1892, Ch. 676.

Second, the lease was not delivered until April 17th, and did not become a contract between the parties until that date, while these alleged conversations occurred on February 15th. Any oral agreement made prior to the actual delivery of the lease was therefore merged in the lease, and superseded by the plain provisions of the lease. The evidence of such oral agreement to vary the terms of the written instrument thereafter delivered between the parties, was wholly incompetent.

*Keenan vs. Keenan*, 12 N. Y. Supp., 747; 58 Hun, 605.

*Whitford vs. Laidler*, 94 N. Y., 145.

*Dietz vs. Farrish*, 79 N. Y., 520.

*Thorp vs. Keokuk Coal Co.*, 48 N. Y., 253.

*Bouvier's Law Dictionary* (Rawle's Revision), Vol. I, p. 715.

*Davis Sewing Machine Co. vs. Stone*, 131 Mass., 384.

Third, *Hollins & Co.*, as stockholders of the plaintiff, could not even by written bargain with the defendant, modify the terms of the lease.

See,

*Saranac Railroad Co. vs. Arnold*, 167 N. Y., 368.

*Buffalo Loan & Trust & Safe Deposit Co. vs. Mecina Gas Co.*, 162 N. Y., 67.

*McDonnell vs. Buffalo L. T. & S. D. Co.*, Court of Appeals October 6, 1908, *Law Journal*, October 19, 1908.

Cooke on Corporations, Section 709 and cases cited under that Section.

*De La Vergne Refrigerating Machine Co. vs. German Savings Institute*, 175 U. S., 41.

It is absurd to suppose that two railroad corporations, advised by such eminent experts on railroad and other law as Mr. Trull and Mr. Auerbach, undertook by oral agreement on February 15, the date the stockholders ratified the lease, to modify essential provisions of the 999 year lease, because a preliminary injunction had been served returnable three days later.

Cook on Corporations, Section 709, Vol. II, 5th Edition, states the rule as follows:

"The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation in such matters is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts."

In *Hayden and another vs. Middlesex Turnpike Corporation*, 10 Mass., 397, the Court laid down a rule that has since been followed in that State, and held that where one of the stockholders had assumed to make a contract for the corporation, the corporation was not liable, although it had confessedly received the benefit of what was done, for the reason that the party assuming to act for the corporation although a stockholder had not been given authority to contract on its behalf. The Court said referring to the corporation:

"But no person is an agent for them who proceeds without any authority, either by letter of attorney or by a corporate vote, or who

acts beside the authority given him; that is, his acts will not charge them, unless subsequently assented to by some act of the corporation."

The Supreme Court of the United States in *Humphreys vs. McKissock*, 140 U. S., 304, held that a mortgage given by a railway company which owned a portion of the stock of an elevator company, which in turn was an owner of an elevator erected by various railroad companies, it having subscribed equally with other companies to the stock of the elevator company, did not cover the property of the elevator company, emphasizing the fact that a stockholder has no control over corporate property. The first headnote to this opinion is as follows:

"Stockholders of a corporation cannot incumber nor transfer its property; the corporation, the artificial being created, holds the property and alone can mortgage or transfer it."

In *Riggs vs. Commercial Mutual Insurance Company*, 125 N. Y., 7, the Court, at page 12, says:

"The stockholder in a corporation has no legal title to the corporate assets or property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner and can deal with corporate property as owner subject only to the restrictions of the charter."

In *American Preservers' Co. vs. Norris et al.*, 43 Fed., 711, an injunction was asked to prevent a manufacturing corporation from resuming business. It appeared that this Company had sold out its business to its principal stockholders, and that the latter had sold the business to a third person, making a covenant not to engage in the business again directly or indirectly for a period of years. After these transfers the corporation built a new plant and again engaged in the same kind of business as



had been transferred to the third person, and entered into competition with such third person. It appeared that the stockholders who had made this trade still remained the principal stockholders of the corporation and were likewise the officers and directors thereof. Nevertheless, Judge THAYER held that an injunction would not lie against the corporation on account of the covenants contained in the transfer by the stockholders. We quote from page 714:

“Evidently, therefore, the contention that the Taylor Manufacturing Company is bound by the agreement must rest wholly on the ground that Messrs. Taylor and Norris are its largest stockholders; that the business of the company inures mainly to their benefit; and that, by virtue of their relation to the corporation as principal stockholders and officers, they have power to control its action, and are bound to so control it as to harmonize with their own individual contracts. But such relation on their part to the company is clearly not sufficient to cast on the corporation the burden of discharging any obligations that such stockholders in their individual capacity may have assumed. As officers and directors of the corporation, it is their duty to serve the interests of the corporation, considered as a distinct legal entity. It is a familiar law that a corporation has a personality of its own, distinct from that of its stockholders; that it is not affected in the most remote degree by contracts made by its stockholders with third parties, whether they own much or little of its capital stock, and is not bound to discharge any personal obligations assumed by its stockholders. (Citing cases.)”

This distinction between the stockholder and the corporation and the respective rights of each is clearly disclosed in the case of *Dupignac vs. Bernstrom*, 76 App. Div., 105, although the decision in that case went against the corporation. A mo-

ment's consideration will show that the decision in that case cannot affect adversely the principle we are contending for here. Briefly, the facts were as follows: The plaintiff and a Swedish corporation, of which the defendant Bernstrom was the managing director, together owned all the stock of another defendant, a New Jersey manufacturing corporation; except a small percentage, which by an agreement they had a right to purchase. A contract was made between the plaintiff and the Swedish corporation by which the latter agreed that if the plaintiff would take and continue in charge of the affairs in the United States of the New Jersey corporation and of the Swedish corporation in its capacity as a stockholder until the New Jersey company should be placed on a paying basis, and should through its earnings pay off its obligations, amounting to about \$200,000, the plaintiff should receive from the New Jersey corporation in addition to any fixed compensation a substantial interest in all the future earnings of the New Jersey Company. The plaintiff, relying on this agreement, assumed the labors and successfully handled the New Jersey Company. Thereafter by supplementary agreement the amount that he was entitled to receive was placed at five per cent. of the net earnings of the company he was so managing. The stockholders of the New Jersey Company held a meeting and passed and spread on the minutes a vote requiring the Board of Directors to estimate the amount of surplus cash on hand or the net earnings over and above current and reasonable future requirements each year and declare cash dividends, but that five per cent. of such surplus and net earnings should be paid to the plaintiff in addition to dividends on his own stock. For several years, pursuant to that resolution, the directors declared dividends and paid to the plaintiff his five per cent. in addition to his dividends on stock. It was claimed in the suit that the stock-

holders and directors of the New Jersey Company threatened and intended to rescind the resolution and deprive the plaintiff of any future rights and interest under said contract, and to distribute the entire net earnings of the Company among the stockholders of record, according to their respective shares. An injunction was asked and a decree establishing the rights of the plaintiff. The plaintiff prevailed. The Appellate Division after adverting to the fact that he had fulfilled his contract as agreed with his co-stockholder, said at page 111:

“It is not apparent, however, that the corporation as such has any interest in these surplus earnings, nor would it seem that its creditors or the public are interested therein. The contract only purports to deal with legitimate dividends. Upon dividends being declared, instead of their being distributed to the stockholders in proportion to their holdings, the stockholders, who alone are entitled thereto, have agreed that the board of directors shall first deduct five per cent. for the plaintiff on account of these services which they recognize as having placed the corporation on a dividend paying basis.”

This quotation shows that the case can have no bearing upon the right of Mr. Hollins as a stockholder to in any way bind the corporation as such, much less to modify the terms of the written instrument, which, under the decision in the Harlem case, could only be modified by the approval of the same by a two-thirds vote of stockholders given in the same formal way that the lease was adopted.

*Watson vs. Bonfils*, 116 Fed., 157, is a case decided by the Court of Appeals, Eighth Circuit. A bank caused to be incorporated realty companies, into which it ran the title to all real estate on which it foreclosed mortgages. It owned all the stock of the realty companies and was the sole creditor. The

bank made a general assignment for the benefit of creditors. Certain of its creditors including Watson with knowledge of the previous assignment attached certain lots in the State of Kansas, the title to which stood in the realty companies. Certain other creditors including Bonfils exhibited a bill in equity to avoid the attachment and to subject the lots in Kansas to sale and disposition for the benefit of all the creditors of the bank. From the opinion it appears that whenever the bank foreclosed on property, it had the title placed in the realty companies, and took from the realty companies notes for the amount for which the property had been sold under foreclosure, and thus had become at the time of the litigation a creditor of the realty companies to the extent of several hundred thousand dollars, besides owning all its stock.

At page 167 Judge SANBORN says in discussing the powers of the bank as such sole creditor and stockholder over the property in the name of the realty companies:

“Nor could the bank disregard or ignore the existence of these realty corporations, and convey their title to this land. It is one thing to create a corporation, and another to dissolve it. It is one thing to vest title to property in a corporation. It is another to divest it. Any one may deed land to a corporation, but no one but the corporation can reconvey it. At the time this assignment was made the title to these lots was in the realty corporations. The bank had no title to them, and no equitable interest in them, except that of a creditor and a stockholder of the corporations that held them. Its deed could not convey and its mortgage could not encumber the title to this land. The corporations which held it were existing entities, as distinct and separate from their stockholder and creditor as is one individual from another. They, and they alone, had the power to sell, convey, mortgage, and deal with the lots

they held. The charters of the corporations and the law of the land denied their stockholder and creditor this privilege. The limit of its power was to convey the notes and the stock of the corporations which it owned. (Citing cases.)”

In the case of *State vs. Morgan's La. & Texas Railroad & Steamship Co.*, 31 Southern, 115; same case, 106 La., the Supreme Court of that State was considering the power of the defendant to conduct a warehousing business. It appeared that all of the stock of the defendant was owned by the Southern Pacific Company. This latter had also had a long lease of the property of the defendant, and while in possession under said lease had assumed to operate certain storage warehouses. Its right to do so was attacked by the State, and it was held that it did not have that right. It surrendered the lease, turned all the property back to the defendant, and the suit brought by the State, reported in 31 Southern, was then brought. It was claimed by the State that as the Southern Pacific Company at the time of the former suit was the owner of all the stock of the defendant, and further, because of the fact that the defendant knew of the pendency of such action, it was bound by the decree. We quote from the opinion:

“It is said finally that the Southern Pacific Company owns all the stock of the Morgan Company, and hence that the judgment against the former is binding upon the latter. There is no attack upon the autonomy of the Morgan Company, and the evidence does not show that there are no other persons occupying the positions of stockholders in said corporation than the Southern Pacific Company. But, if it were otherwise, the authorities on the subject of the status of what may be called ‘nominal’ stockholders, and of corporations the stock of which is owned by one person, concur to the effect that a person is none the less a stock-



holder, for the purpose of participating, in that capacity, in the administration of the affairs of the corporation, that his stock has been transferred to him merely to qualify him (citing cases), and that the fact that one person owns all the stock in a corporation does not destroy the corporation or make him and the corporation one and the same person, but that the latter continues to exist as a separate entity and the former continues to occupy the status of a stockholder (citing a number of cases).<sup>4</sup> We, therefore, conclude that the Morgan Company is not bound, as claimed, by the judgment heretofore entered in the matter of *State vs. Southern Pac. Co.*"

In the case of *Pullman Palace Car Co. vs. Mo. Pacific Ry. Co.*, 115 U. S., 587, it was claimed by the Pullman Company that the St. Louis, Iron Mountain & Southern Railway Company was controlled by the Missouri Pacific Company, and therefore that the Missouri Pacific Company was bound under its contract to haul the palace cars over it. It appeared that the Missouri Pacific owned the stock of the Railway Company, and in that way selected its directors. The Supreme Court, however, held that that did not give it as such stockholder control of the road. Chief Justice WAITE delivered the opinion of the Court and among other things he said:

"The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, *but they are not the managers of its business or in the immediate control of its affairs.* Ordinarily they elect the governing body of the corporation and that body controls its property. \* \* \* The directors

now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election at the proper time and in the proper way of other directors or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

In the case of *Atchison, Topeka & Santa Fe Ry. Co. vs. Cochran*, 23 Pac., 151, it was held that while the Atchison road owned all the stock of a sub company, it nevertheless was not liable for the negligence of the officers, agents or employees of the sub-company in the operation of its road.

A very elaborate discussion of this question will be found in the case of *Button vs. Hoffman* (Wisc.), 20 Northwestern Reporter, 667. In that case one man owned all the stock, and he claimed therefore to be the absolute owner of a mill. The Wisconsin Court said:

"From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural person who procured its creation, and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed and disposed of. It must purchase, hold, grant, sell and convey the corporate property, and do business, sue and be sued, plead and be impleaded for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers

and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary co-partnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons are merged into the corporate identity. Ang. & A. Corp. §§40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. §557. The corporation is the trustee for the management of the property, and the stockholders are the mere *cestui que trust*."

The Court then proceeds to instance and summarize the rulings in many cases, some of them in the State of New York, emphasizing the distinction between the rights of stockholder and that of the corporation of which he is a member, even though he may be the sole stockholder.

In *Havana City Railway Co. vs. Ceballos*, 49 App. Div., 263, a demurrer was sustained on the ground of misjoinder of parties plaintiff, where the Havana City Railway Company and the trustee holding all of its stock were joined as plaintiffs in an action to compel the delivery to the corporation by the defendant of an assignment of a certain horse car concession granted by the City of Havana. The Court held that no right to the franchise vested in the stockholders as distinct from the corporation, and that, therefore, the corporation should have been made the sole party plaintiff. At page 268 the Court said:

"The right to this concession under the contract vested in the corporation, and while it is true that a stockholder of the corporation has in one sense an interest in the property of

the corporation, he has no interest which would entitle him to join in a proceeding to enforce this obligation to the corporation. All of the creditors of a corporation may be said to have an interest in the corporate property, as they must look to such property for the payment of their debts; and, so, the stockholders of a corporation have an interest in the property, as upon the dissolution of the company they would have a right to receive their share of the corporate property after the payment of the debts of the corporation. Such an interest is not an interest in the subject of an action brought to enforce an obligation to the corporation or to recover possession of its property."

**Detailed discussion of Point IV showing that even if defendant was entitled to charge against the \$6,000,000 fund expenditures after February 14, it is still indebted to plaintiff in a large amount.**

*If by any possibility the Court should find that the accounts between the two companies should be adjusted as of February 14, notwithstanding the provisions of the lease, then the situation would work out as follows:*

**Defendant's Bill of Particulars as Modified by Evidence, Stipulations and Admissions, as of February 14, 1893.**

Exhibit A—Construction.

Final Footing of		
Exhibit,	\$1,088,615.96	
Footing of Items to		
Feby. 14,	132,938.21	
	<hr/>	\$ 895,677.75

Exhibit B—Real Estate.

Final Footing of		
Exhibit,	1,676,227.10	
Footing of Items to		
Feby. 14,	913,704.23	
	<hr/>	\$ 762,522.87
Add Credits before		
Feby. 14,	921.55	
	<hr/>	\$ 763,444.42

Exhibit C—Equipment.

Final Footing of		
Exhibit	1,106,353.46	
Footing of Items to		
Feby. 14,	596,576.80	
	<hr/>	\$ 509,776.66



## Exhibit D—Extraordinary Exp.

Final Footing of		
Exhibit,	386,233.79	
Footing of Items to		
Feby. 14,	119,883.68	
	<hr/>	
	\$266,350.11	
Add Credits before		
Feby. 14,	5,824.47	
	<hr/>	
		\$ 272,174.58

## Exhibit E—Cash Advances.

Final Footing of	
Exhibit,	4,622,018.00
	<hr/>
Total,	\$7,063,091.41

*Deductions to be made from total of defendant's bill of particulars as of February 14.*

V. A. 528 and 530, Exhibit E (see pp. 337-45),	\$25,548.11
Defendant's Operating Expenses paid by plaintiff,	42,532.84

(See p. 326 *et seq.*)

Journal Entries Ex. A., p. 25,	192,391.00
“ “ “ “ 26,	27,619.67
“ “ “ “ 28,	20,644.14
“ “ “ “ 29,	163.89
“ “ “ “ “ “	5,297.24
“ “ “ “ “ “	134,775.16
“ “ “ B.,	
p. 53,	\$112,206.03

Less credit for amount paid a/c generators delivered after Feby. 14th,	13,542.10	
	<hr/>	
		\$ 98,663.93
(See p. , of this brief.)		

Journal Entries, Exhibit C, p. 8,	177,445.79
“ “ Exhibit E, p. 3., interest on surplus,	41,655.41
Amount paid since Feby. 13, on account of Construction Obligations then outstanding, as established by proof (Appendix B),	194,345.99
Amount paid since Feby. 13, on account of Construction Obligations then outstanding, as established by stipulation (p. 392),	59,838.18
	<hr/>
Total deductions	\$1,020,921.35
Gross amount of Bill of Particulars after Feby. 14, as above,	7,063,091.41
	<hr/>
Net payments by defendant,	\$6,042,170.06

*Assets applicable to conversion after paying outstanding obligations and surplus on and after February 14.*

#### SURPLUS ACCOUNT.

Surplus as of Feby. 14, 1895 (p. 2365),	\$ 668,543.54
Less accrued operating expense, p. 7482,	\$108,040.01
Less accrued Taxes,	20,792.76
Less accrued Interest,	29,020.83
	<hr/>
	157,853.60

Actual book surplus,	\$ 510,689.94
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To apply on same—

Supplies on hand (Defendant's Exhibit 1457, p. 4),	\$439,264.36
Mortgage (Defendant's Exhibit 1457, p. 4),	70,000.00

General cash on hand,	217,781.93	
Premiums actually received on bonds and stock (Ex. 1457),	231,789.60	
	<hr/>	
	\$958,835.89	
Less accrued operation, tax and interest (p. 7482),	157,853.60	
	<hr/>	800,982.29
Balance to apply on conversion,	\$	290,292.35
Other Conversion funds—		
Capital stock,	\$3,000,000.00	
Bonds,	3,000,000.00	
Note paid by B. H. R. R.,	308,340.35	
Interest paid on same,	16,136.46	
Miscellaneous Capital receipts admitted by Defendant's Exhibit 1457,	4,853.66	
	1,856.27	
	63,937.50	
	11,474.40	
Proceeds of Sands St. Property,	150,000.00	
Proceeds of High St. Property,	16,500.00	
Conversion cash on hand (p. 2364),	\$492,354.35	
Less outstanding Conversion obligations,	254,104.18	
	<hr/>	238,250.17
Total Conversion Funds,	\$7,101,641.16	
Amount actually expended,	6,042,170.06	
	<hr/>	
Unexpended balance,	\$1,059,471.10	

If defendant is entitled to credit only for conversion expenditures after April 17th, then the figures above should be changed as follows:

Net payments by defendant after	
February 14 as above	\$6,042,170.06
Less payments after February 14 for	
labor and material furnished from	
February 14th to April 17th as per	
stipulation (p. 392) and proof (Ap-	
pendix B),	466,911.35
<hr/>	
Net payments after April 17th for	
work and material after that date	5,575,258.71
Conversion funds applicable thereto	
(see last preceding tables).	
Balance of moneys, credits and securi-	
ties after deducting surplus as of	
February 14, as above	290,292.35
Net conversion cash on hand February	
14 as above	238,250.17
<hr/>	
	528,542.52
Less subsequent payments for labor	
and material furnished from Febru-	
ary 14 to April 17 as per stipula-	
tion (p. 392) and proof (Appen-	
dix B),	466,911.35
<hr/>	
Applicable to conversion,	61,631.17
Other Conversion funds:	
Capital stock,	3,000,000.00
Bonds,	3,000,000.00
Note paid by B. H. R. R.,	308,340.35
Interest paid on same	16,136.46
Miscellaneous capital receipts ad-	4,853.66
mitted by Defendant's Exhibit	1,856.27
1457,	63,937.50
<hr/>	
	11,474.40

Proceeds Sands Street property	150,000.00
Proceeds High Street property	16,500.00
<hr/>	
Total conversion funds on and after April 17	6,634,729.81
Amount actually expended as above after that date	5,575,258.71
<hr/>	
	1,059,471.10

The result is the same as that reached by cutting off the account at February 14, because the funds actually available for conversion on February 14 were more than sufficient to cover the subsequent conversion expenditures for work and material between February 14 and April 17.

In the foregoing table the book surplus and the funds applicable thereto are treated as though no change in either occurred from February 14 to April 17. In fact the proof shows that (excepting for the dividend of March 31st, which does not affect the net result) the net earnings did increase the surplus between those dates. But since such net earnings would correspondingly increase the funds applicable to surplus, both such net earnings and the corresponding increase in funds applicable thereto are ignored in this table.

So that if by any chance the date of cut-off should be fixed at either February 14 or April 17, the defendant owes the plaintiff \$1,059,471.10 which by chance is within \$316.55 of the amount (\$1,059,154.55) which Phelps reported plaintiff had expended on June 16, 1894, on defendant's property.

If either of these dates is adopted, plaintiff is therefore entitled to judgment for \$1,059,880.80, with interest from June 16, 1894.



**Detailed discussion of Point V  
showing moneys, credits and securi-  
ties on hand June 6, 1893.**

It is apparent that the claim set forth in the answer that the defendant had no securities on hand at the date the lease took effect is an afterthought. The testimony shows that on June 6, 1893, the defendant had on hand moneys, credits and securities as follows (page 322) :

*Cash.*

Defendant's cash book, page 157, showing cash balance on hand, June 6, 1893,	\$284,673.62
Defendant's cash book, page 181, under date of June 30, showing passenger receipts for June 5, 1893,	13,578.79
Defendant's cash book, page 157, showing petty surplus and deficiency, June 6, 1893,	5,949.60
Defendant's cash book, page 157, miscellaneous cash items,	731.17
	<hr/>
Total cash,	\$304,933.18
	<hr/>

*Securities on Hand.*

Defendant's bill of particulars, Schedule "B," Amount due on mortgage on Grand View Hotel,	\$22,115.86
Defendant's bill of particulars, Schedule "B," Sands Street Church property,	\$150,000.00

Interest on sales price from March 24, 1893, to June 5, 1893,	1,500.00	
	<hr/>	\$151,500.00

Total securities on hand,	\$173,615.86
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*Credits on Hand.*

The following items on Defendant's bill of particulars, Schedule "B":

New York and Bowery Fire Insurance Company Policy on Grand View Hotel,	\$1,500.00	
Rents accrued to June 5, 1893,	845.60	
Coney Island & Brooklyn R. R.,	2,554.60	
J. Tompkins,	334.00	
Brush and Leggett,	34.14	
D. Reuchenberg,	809.63	
Binns and Van De Water,	303.92	
First National Bank of Utica,	36.09	
Nassau Gas Light Company,	9.00	
G. Asche,	11.37	
T. McConekey,	12.06	
B. E. Miller and Son,	25.00	
C. H. Bergen,	1.20	
J. C. Cameron,	1.00	
	<hr/>	
Total,	\$6,477.61	\$6,477.61

Grand total moneys, credits and se- curities on hand June 6, 1893,	\$485,026.65
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## DETAILED DISCUSSION OF POINT VI.

### THE TRIPARTITE AGREEMENT.

#### I.

**The evidence in the case proves conclusively that the tripartite agreement was not intended to be and was not an adjustment of the obligations of the defendant with respect to the six million dollar fund.**

The plaintiff called Alfred A. Noble, who was working for the plaintiff as an accountant from about the 1st of September, 1893, and remained until some time in January, 1897 (p. 1680). He had the supervision of all the accounts and reports that came under the jurisdiction of the secretary and treasurer and of the method of keeping the accounts and inaugurated a system of bookkeeping for the plaintiff. He had charge of the distribution of all expenditures as between construction and maintenance, and directed to what account the various vouchers should be charged (p. 1681). He saw to it that the vouchers were entered in the accounts as directed by him, and knew that the distribution made by him as between construction and operation was correct (p. 1683). He made up an account of the expense of the plaintiff for construction to September 30, 1893 (p. 1685), which was introduced as Plaintiff's Exhibit "2" (p. 1686). He checked this up with Mr. Swin, the bookkeeper of the defendant, and also checked up with Mr. Swin Exhibit "4," being the account of expenditures of the plaintiff from September 30, 1893, to December 31, 1893 (p. 1687). He then made up another account to March 31, 1894, Exhibit 1118 (p. 1688). He also made up the

so-called disbursing committee's certificates, with Exhibits 1119 to 1161 inclusive (pp. 1689 to 1706).

On cross-examination Mr. Noble testified that he assisted Mr. Phelps in making up the Phelps' report (p. 2336), and that he and Mr. Swin made up various statements.

Mr. DeWitt then asked him (p. 2337) :

"Q. These were statements made up preliminary to the settlement of accounts between the companies, were they not? A. I believe it was a statement prepared to show the requirements of the company to complete certain work.

Q. That was with a view of determining the settling of accounts? A. Not to my knowledge. *I have no knowledge of the settlement of accounts.* I understood it was to prepare statements to show the requirements of the company to liquidate its accounts."

Noble further testified it was about borrowing money on those collateral trust notes (p. 2338). He knew that the company borrowed on the collateral trust notes and that the Heights Company kept an account including the money furnished to the disbursing committee on the collateral trust notes (p. 2338).

Mr. DeWitt then asked: "Have you not repeatedly said that all these accounts were thoroughly threshed out before the final adjustment in August, 1894?" To which Mr. Noble answered "Yes," and further continued that the statement made by him was true (p. 2339).

On page 2415 Mr. Noble says that by this statement he meant that the accounts had been examined by Mr. Bogardus and Mr. Swin, and also the committees appointed by the companies. That by the committees he meant the committees who examined the accounts included in Exhibits "2" and "4." He admits that these committees never examined the third certificate covering the expenditures of the

plaintiff after January 1, 1894 (p. 2415). He says also that when he spoke of the accounts threshed out, he referred to the Phelps' report, Exhibit 1440 (p. 2419).

Noble says (p. 2421) there was a committee of the Brooklyn City to examine the accounts of the Heights Company—that was the committee that made the examination. There was no committee appointed by the Heights for that work. The Brooklyn City Committee was appointed for the purpose of verifying the accounts rendered by the Heights Company for these first two periods (p. 2424).

Mr. Noble testifies that it was his understanding that the tripartite agreement arose out of the settlement of the accounts between the two companies (pp. 2423-24). But on redirect he admitted that no committee of the defendant went over the vouchers making up the statement of March 31, 1894 (p. 2427). He could not recollect submitting any statement relative to the six million dollar fund to any committee of the plaintiff. He never knew of any examination of the yellow sheet (prepared by Mr. Swin) by any committee of the Heights Company. He never knew of the exhibition of the yellow sheet to any committee or board of directors of the plaintiff (p. 2429), but he merely took the yellow sheet and checked certain items in them with the amounts shown on the Brooklyn City books. He never checked the vouchers of the Brooklyn City to ascertain what they had expended in construction and conversion and never made any statement of the expenditures of the Brooklyn City on construction and conversion after June 6, 1893, or after February 14, 1893 (p. 2430). He had no recollection that he ever checked up the books and vouchers of the defendant with reference to any expenditures for conversion or construction after February 13, 1893. He knew that an account had been made up showing the aggregate expenditures of the defendant for conver-

sion and construction (p. 2430), but did not know to what part that related, or what the results of the statement were, and did not know what became of such statement, or whether it was submitted to Mr. Lewis (p. 2431). He never saw any account in the books of the defendant relative to the six million dollar fund. He admitted that he would have seen any statement which covers the expenditures of the Brooklyn City for construction and conversion at any particular date, if any had been made, but he never saw or knew of any such statement, and apparently the only statement which he ever had seen was the so-called yellow sheet (p. 2432).

The plaintiff demanded of the defendant the production of any account or statement of accounts ever prepared by the officers of either company and submitted to the executive committee or board of directors of either company, showing any adjustment of accounts between them, especially with reference to the six million dollar fund, but no such statement has ever yet been produced.

Mr. Leggett (p. 3508) produced an account (Ex. 57) which he says was used in making up the tripartite agreement. This account shows a balance due the plaintiff on May 10, 1894, of \$737,749.97, and contains no reference to defendant's advances or payments, except a credit of \$4,297,485.01. This Exhibit 57 is therefore additional proof that no accounting of the \$6,000,000 fund was made, yet without an accounting of that fund, and in the face of Phelps' report that defendant owed plaintiff over a million dollars, plaintiff gave defendant its notes for over \$650,000.

Mr. Noble (p. 2434) says the figures in the yellow sheet were verified by Phelps, but admits that Phelps' report was completed June 16, and admitted that the Phelps' report contained no reference to the Brooklyn City fund of six million dollars, and admitted that Mr. Phelps did not examine the Brook-



lyn City books at all in making up his report (p. 2425). Mr. Noble admitted (p. 2436) that he had told counsel for plaintiff a number of times that he knew of no examination of the accounts made by any committee with the exception of the two certificates, Exhibits "2" and "4," which relate solely to expenditures by the plaintiff (p. 2436).

Referring to his answer to Mr. DeWitt's question about the accounts being threshed out, he states, on page 2437, that this referred to his testimony that the accounts had been practically threshed out and examined from time to time. He says that the accounts had been examined by committees of both companies, also by the expert accountant and that is what he had in mind when the statement was made (p. 2439).

Reading this in the light of his other evidence, that no committees ever examined any accounts except Exhibits "2" and "4" and that Mr. Phelps did not examine the City's books, it is clear that his entire evidence relates only to Exhibits "2" and "4" and to the Phelps' account, neither of which have any relation to the six million dollar fund. Mr. Merritt, president of the defendant, says there was no statement furnished at any of the meetings previous to the making of the tripartite agreement purporting to show the expenditure of the \$6,000,000 (p. 3441).

It is shown therefore:

1st. That the defendant never kept an account showing the expenditure of the \$6,000,000 fund.

2d. That the accountant Phelps in July, 1894, had reported that the Heights had expended \$1,059,543.34 and that this amount was owed by the defendant to the plaintiff on account of construction.

3d. That the only accounting made prior to August, 1894, was the accounting with reference to

the expenditures of the plaintiff out of moneys received from the defendant as included in Exhibits 2 and 4, being the first two construction certificates.

4th. That prior to this tripartite agreement an account had been made up by Swin on a yellow sheet, which purported to show the amount of the surplus of the defendant and the amount of assets which it had on hand with which to pay itself such surplus. A discussion of this yellow sheet will show conclusively that it was based upon the theory that the defendant had the right after June 6, 1893, arbitrarily to transfer nearly \$800,000 from operation and supply account to construction and surplus, with the effect of increasing its alleged surplus by that amount.

5th. A committee of directors had been appointed by the plaintiff and a committee by the defendant to pass upon the accounting between the companies, but these committees had never met.

Under this situation the tripartite agreement was entered into and a recital inserted that:

“Whereas said Heights Company is indebted to said Brooklyn Company in large sums of money for advances made to it by said Brooklyn Company in and by the conversion of said demised railroads into an electric railroad and the equipment of the same as such, in anticipation of the sale of certain real estate and personal property of the Brooklyn Company, which under the terms of the lease were to be sold and the proceeds applied to such electrical construction equipment.”

Article Third of the tripartite agreement contains a covenant on the part of the Heights to execute and deliver a note for \$308,340.35 “being a part of the indebtedness of the said Heights Company to said Brooklyn Company.”

In Article Fourth of the tripartite agreement the defendant contracts to advance

"the money requested to pay any balance due or to become due on contracts made by it for the construction, conversion and equipment as electric railroads of said railroads demised by it to said Heights Company, and any balance due by it as of date of June 6, 1893, for other purposes, which said balances amount to \$347,036.44 or thereabouts."

There is also an agreement that these advances shall constitute part of the \$1,375,000 which the defendant agreed to loan under the tripartite agreement.

The provisions above quoted are the only ones in the agreement which even suggest that there had been an accounting between the parties.

There is not a word in the tripartite agreement that refers in any way to the \$6,000,000 fund. The plaintiff might have been indebted to the defendant for rentals, for interest on bonds, for organization expenses, or for advanced payments out of real estate which it was expected to sell.

An adjustment of the accounts in any of these particulars could have nothing to do with an adjustment of the total construction obligations of the plaintiff, especially in view of the facts above set forth.

**II.**

**The directors and officers of the plaintiff at the time of making the tripartite agreement annexed to the answer were stockholders in and controlled by the defendant, and their action is not binding on the plaintiff.**

It is very seldom that so extreme a case is developed of adverse interest of directors and officers as appears here. The alleged accounting and settlement set up in the answer in bar of this suit is claimed to have been arrived at in connection with or immediately prior to the so-called tripartite agreement. This was dated August 15, 1894, fourteen months after the lease had taken effect. A very short time after the complete control of the plaintiff corporation was in the hands of representatives of the defendant trouble began about advancing further moneys under the provisions of the lease. The directors of the defendant, in March, 1894, passed a resolution refusing to make any further payments on account of construction to plaintiff (p. 7349). The plaintiff company had practically no assets outside of its interest in this leasehold property. The Brooklyn Heights Company itself was the owner in fee simple of only a short line of cable railroad about half a mile in length running from the Wall Street Ferry to Court Street. Its capitalization was only \$200,000. Its stock was all owned by the Long Island Traction Company, which had substantially no other assets. The Traction Company was a holding company organized under the laws of the State of West Virginia. It appears without contradiction that its stock had been actively traded in in the market, and the shares that the stockholders of

the Brooklyn City Railroad Company had been able to acquire under the terms of the financial arrangement hereinbefore detailed, or the rights to secure those shares, had been to a very considerable extent disposed of. The stock had gone as high as \$40 in the market, which gave the Brooklyn City stockholders a handsome profit over the issue price of \$15 per share (p. 3394). The rights were also traded in before the stock was issued (p. 3395). Mr. Leggett, who was very influential, to say the least, in fixing up the tripartite agreement, testified that he owned 24,000 shares of Brooklyn City and availed himself of the right to subscribe for Long Island Traction stock which he sold at a profit (p. 3458). Therefore large numbers of outside parties were thus indirectly interested in the ownership of the Brooklyn Heights stock, even before June 6, 1893, and so would be the losers if by any chance the lease fell in and the property of the Brooklyn City Company reverted to that corporation. It is admitted that the stockholders of the Traction Company never approved the tripartite agreement (p. 7483). On the other hand, it was at that time greatly in the interest of the Brooklyn City as a corporation, and thus of its stockholders, that default should be made by the Brooklyn Heights under the lease. In case of continued default in the payment of rental, the four million dollar guaranty fund was by the terms of the lease to become the property of the Brooklyn City Company. Any sums of money that the Brooklyn Heights Company had been able to secure from any source to expend upon property of the defendant was a debt only of the plaintiff and in case it should prove impossible to pay such debt its creditors would go remediless or substantially so, and the Brooklyn City Company would get not only the guaranty fund, but would have its property returned to it vastly

augmented in value. Under the terms of the agreement of January 24th, 1894 (Exhibit , p. 75/9), in case of default in rental under this lease, the defendant became the absolute owner of all the capital stock of the Brooklyn, Queens County and Suburban Railroad Company, without the payment of one dollar. It appears by the examination of Mr. Phelps made in June, 1894, that the Brooklyn Heights had expended \$1,059,154.55 in the conversion of horse railroads into electric railroads, which had not been returned to it by the Brooklyn City Company. With the great financial advantages to come to the defendant directly from the falling in of the lease, and in view of the critical situation of the plaintiff in the spring and summer of 1894, the Brooklyn Heights Company was certainly in need of a board of directors and a corps of officers devoted to its service, without any adverse interest to sway their action. Therefore there is every reason why, in determining the rights of the parties growing out of the transactions that took place at that time, the Court should scan not only the actions, but the environment, the history, and the financial interest of the persons representing the plaintiff; and no reason can be advanced why the well recognized rules of law which prohibit trustees from serving two masters should not be applied with the extremest rigor. The president of the plaintiff corporation who was its chief representative at this time, was, however, a man whose whole business life had been identified actively with the defendant. Mr. Lewis himself testified, at page 3229, that he was connected with the Brooklyn City Company from June, 1868, and that he became president of that corporation in December, 1886, and continued in that office until February 21, 1894, two weeks after he was elected president of the plaintiff corporation, and he was at that time surrounded by his old



associates of the Brooklyn City Company. On January 24, 1894, as is stipulated in this case, a new board of directors of the plaintiff corporation was elected, consisting of the following named gentlemen, who were then and in August, 1894, the owners of the number of shares of stock in the defendant Brooklyn City Railway Company set opposite their names respectively :

Name.	No. of Shares.	Worth.
E. W. Bliss,	4,000	\$ 65,000
Crowell Hadden,	4,014	65,237.50
Silas B. Dutcher,	133-1/3	2,166.66
Seth L. Keeney,	8,000	130,000
David H. Valentine,	4,000	65,000
Henry D. Polhemus,	12,200	198,250
Daniel F. Lewis,	13,500	219,375
Felix Campbell,	4,560	74,100
Edward Johnson,	None	
Charles F. Watson,	None	
Edmund C. Stanton,	None	
George G. Haven, Jr.,	None	
James F. Timpson,	900	14,625
Total,		<hr/> \$833,754.16

In giving the value, we have taken 162½ as the average market price as shown by the stipulation appearing at page 7483.

It will thus be seen that even at this early date nine directors out of thirteen were the registered owners of Brooklyn City stock, and, as it appears by the testimony of Mr. Auerbach that the Mutual Life Insurance Co. was a large owner of Brooklyn City stock, Mr. Haven, being at that time connected with it, was likewise not a disinterested director. On February 7, 1894, this board elected as the officers of the plaintiff the following persons:

Daniel F. Lewis, President; E. W. Bliss, Vice-President; Cyrus B. Smith, Secretary and Treasurer; T. P. Swin, who was the owner of 2,588  $\frac{2}{3}$  shares of Brooklyn City stock, Assistant Secretary and Treasurer; and W. A. H. Bogardus, who was the owner of 62  $\frac{2}{3}$  shares of Brooklyn City stock, General Manager. Swin was, and for years had been, as we shall see later, an officer and stockholder of the Brooklyn City Company. Certain minor changes were made in the board of directors on February 21, and on March 7 the president appointed an executive committee consisting of himself, Mr. Bliss, the Vice-President, Mr. Campbell, Mr. Hadden, Mr. Keeney, and Martin Joost, who had recently come on the board, and who had no stock in the Brooklyn City Company. Therefore, at the time the Brooklyn City Company refused to make further advances to the Brooklyn Heights Company, thus leaving it almost helpless and dependent on its own meagre resources, all of the officers of the Heights, except the secretary and treasurer, over two-thirds of its board of directors, and every member but one of its executive committee, were stockholders of the Brooklyn City Company.

On May 9, Martin Joost, the single disinterested member of the executive committee, resigned from the board. This left the executive committee composed entirely of Brooklyn City stockholders.

On August 1, W. A. H. Bogardus and John G. Jenkins were elected as directors, so that on that date the following gentlemen constituted the board:

Messrs. Campbell, Jenkins, Polhemus, Hadden, Lewis, Dutcher, Bogardus, Valentine, Keeney, Bliss, W. S. Sloan, A. Abraham, and Frank Bailey, the three latter holding no stock in the City Company. But on August 13, two days before the tripartite agreement was executed, both Mr. Sloan and Mr. Abraham resigned from the board, and there were elected

in their places Mr. William Marshall, the holder of 7,200 shares of City stock, and Mr. Charles T. Young, who while holding no stock in his own name, represented as trustee a large block of stock; and it might be added that even Mr. John G. Jenkins had 541 shares of stock standing in his name as executor. Consequently the only member of the board at that time who could be said to be absolutely free from any adverse influence as a stockholder in the City Company was Mr. Bailey, and he resigned from the board on August 16. Thus, excluding the Mutual Life holdings, which were admittedly very large, and represented by Mr. Haven, and excluding the stock represented by Mr. Jenkins and Mr. Young, the value of the stock owned by the directors and by Swin at the date of the tripartite agreement was \$1,070,276.66.

It appears by the testimony that on August 30, 1894, at a special meeting of the board of directors of the Long Island Traction Co., the president, Mr. Lewis, stated that Mr. Bogardus was acting only as a temporary member of the board, and that it would be advisable to call a meeting for the purpose of accepting his resignation and electing someone to take his place, and suggested the name of Dr. Hoagland. The latter was, evidently pursuant to such suggestion, elected a director of the Brooklyn Heights on September 12, 1894, in place of Mr. Bogardus, resigned, and at that time Mr. Hoagland was the owner of 12,680 shares of stock in the Brooklyn City of the value of \$221,900.

It appears by the stipulation (pp. 7259-7260) that the Long Island Traction stock on August 10, 1904, immediately previous to the tripartite agreement, was quoted in the market  $14\frac{3}{4}$  bid and  $14\frac{7}{8}$  asked. Certain of the directors of the Brooklyn Heights Railroad Company were at that time owners of Long Island Traction stock, but the value of their holdings in that company were very much

less than their interest in the stock of the Brooklyn City, as shown in the table and statement above.

The defendant at page 7259 offered in evidence a table showing the respective holdings of the Brooklyn Heights directors in Brooklyn City stock and in Long Island Traction stock at the date of the tripartite agreement, and in this table set out the par value of the traction stock as the amount owned by each individual. If the respective interests of holders of traction stock who are also holders of City stock are tabulated, the result is as follows:

Name.	Actual value Brooklyn City holdings.	Actual value Traction Company holdings.
E. W. Bliss,	\$ 70,000.00	\$ 10,500.
Crowell Hadden,	70,245.00	16,500.
Silas B. Dutcher,	2,333.33	450.
Seth L. Keeney,	140,000.00	30,000.
David H. Valentine,	70,000.00	3,000.
Henry D. Polhemus,	213,000.00	27,330.
Daniel F. Lewis,	236,250.00	44,850.
Felix Campbell,	76,800.00	48,000.
Wm. Marshall,	126,000.00	33,750.
W. H. Bogardus,	1,150.00	150.
Dr. Hoagland,	221,900.00	18,000.
	<hr/> \$1,227,678.33	<hr/> \$232,530.

The foregoing table is based on value of \$15 per share for the Long Island traction stock, and \$17.50 per share for Brooklyn City stock in accordance with the proof.

This is exclusive of holdings in Brooklyn City of Timpson, whose Brooklyn City stock was worth \$15,750, while he appeared to own no Traction Company stock, and of the Mutual Life Insurance Company, represented by Haven, which was admittedly very large.

At pages 2559 to 2592 of the record will be found a full list of the officers, directors and executive committee men of the Brooklyn Heights Company and of the Long Island Traction Company from time to time, but we desire to address the attention of the Court particularly to the class of directors that were supposed to be representing the plaintiff company at the time this alleged settlement is claimed to have been made. A very interesting statement was made by Mr. Lewis at page 3296 of the record, when he was under examination by Mr. DeWitt and was being interrogated about the conferences that took place with reference to the necessity of raising funds in the spring and summer of 1894. He was being asked as to the names of the gentlemen representing the two corporations, and gave the following testimony :

“Q. You recall you represented the Heights Company? A. I was at that time the president of the Heights Company.

Q. Crowell Hadden was for the Heights Company, wasn't he? A. I think he was.

Q. And who else do you say of the Heights Company was there? Mr. Leggett and Mr. White represented the Brooklyn City Company? A. I don't remember about that without looking at the records.

Q. You remember that neither of those gentlemen were in the Heights Company? A. *I don't recollect that distinctly for the reason that we took certain men out of one company and we put them in the other and made distinct boards between the Brooklyn City and Brooklyn Heights.”*

There could be no more graphic description of the situation as it then existed than this given by Mr. Lewis. The latter and his associates in the City Company controlled the whole situation, and as he says, they took certain men out of one company and put them in the other so as to *ostensibly* have distinct and separate boards.

On page 3302 he gave this evidence:

“Q. You have mentioned Mr. Merritt, Mr. White, Mr. Leggett; do you recollect any others? A. Mr. Bliss I think I mentioned, and Mr. Campbell.

\* \* \* \* \*

By the Referee:

Q. Whom did they represent? A. I couldn't tell without reference to the minutes.”

Evidently these directors must have been exceedingly violent in their advocacy of the claims of their respective companies, if Mr. Lewis, the president, was not able to tell of which board they were members.

At page 3308 Mr. Lewis testified, in answer to Mr. DeWitt, that the tripartite agreement was the outcome of all those meetings. This is the agreement that is pleaded as a bar to this suit. There is a bit of humor in the following question and answer at page 3319, the witness being still under examination by Mr. DeWitt:

“Q. During your presidency of the Brooklyn Heights Co., which extended at least over some part of the year 1895, and subsequent to the tripartite agreement, was there ever any demand made by the Brooklyn Heights Railroad Company on the Brooklyn City Railroad Company for any further moneys under the lease? A. To the best of my recollection never.”

In view of the situation, it would hardly have been expected.

On cross-examination Mr. Lewis' relation to the two corporations was made a little clearer, if possible. At page 3320 he testifies that he retired from the presidency of the Brooklyn City February 21, 1894, having been elected president of the Brooklyn Heights on February 7, 1894, so that for two weeks he was president of



both companies, although he is not certain that he was in the city during all of that time. Again, at page 3352, when Mr. Lewis was testifying as to his understanding that the funds of the Brooklyn City applicable to conversion were exhausted in the spring of 1894, he said that he was notified by the treasurer of the condition of affairs. Then follows this testimony:

“Q. Which treasurer do you mean? A. Mr. —whoever he was, I don’t know.

Q. Of which company? A. Mr. Bogardus called my attention to it.

Q. Which company was he connected with at the time? A. That I could not recall without reference again. You see we were mixing people up so at that time you will have to indulge me in referring to the minutes for that.”

Further on in the cross-examination of Mr. Lewis, at pages 3377 and 3378, it appeared that his election as president of the Brooklyn Heights was in reality a good deal of a form, as he had been running the business of both companies from June 6, 1893, on. After stating that he sat in the president’s office of the old Brooklyn City from June 6, 1893, until February, 1894, less the time that he was absent in the South because of sickness, he gave the following testimony:

“Q. That is what I wanted to get at. I wanted to know what your relations to this business were between June 6, 1893, and the time that you went South because of illness in the winter of 1893-4. What did you do during that time? A. I operated the railroads.

Q. You operated the railroad just the same as you had before the 6th of June? A. Yes.

Q. What title did you have, if any? A. No title under the Brooklyn Heights until February, 1894.

Q. But you had charge of the business of the Brooklyn Heights, although without a title,

up to the winter when you went South, sick?  
A. At the request of the officers of the Brooklyn Heights, yes.

Q. So that as a matter of fact, from the time that you became president of the Brooklyn City Co. up to the time that you ceased to be president of the Brooklyn Heights Co. in 1895, you continuously did the business yourself first of one company and then of the other, except as you were absent on account of illness? A. So far as operating and administration were concerned, less the bookkeeping.

Q. Who had charge of the bookkeeping of the Heights Co. after the 6th of June, 1893? A. I don't recollect.

Q. That was under your general supervision, wasn't it? A. Yes, the general supervision of the Brooklyn Heights after June 6th was under me; my recollection is that Mr. Bogardus at that time supervised those books; who kept them I don't recollect."

As further disclosing the fact that this so-called adjustment in the summer of 1894 was made by the City Company, without any independent representation of the Heights, attention should be called to the testimony of Mr. Leggett, a Brooklyn City director and very large stockholder, on cross-examination, page 3459, as follows:

"Q. I was referring to your evidence which you gave the other day, where Mr. DeWitt asked you this question: 'You took an active and somewhat controlling part in the meetings and discussions and decisions on the various matters coming up in respect to the settlement of the account of the Brooklyn City, Brooklyn Heights and the Traction Company in 1894' and your answer was that you did? A. Yes.

Q. That was true, that you did to a certain extent control that so-called settlement and adjustment? A. Yes."

As Mr. Bogardus figures so largely in these transactions, it is important likewise to see what his re-

lations were to these respective companies. The records introduced in evidence show that he was secretary and treasurer of the Brooklyn City from January 6, 1893, to February 21, 1894; was assistant treasurer of the Brooklyn Heights from June 6, 1893, to June 15, 1893; was treasurer of the Brooklyn Heights from June 15, 1893, to August 15, 1893; was secretary and treasurer from August 15, 1893, to January 29, 1894; was general manager of the Brooklyn Heights from January 29, 1894, to October 2, 1894; was secretary and treasurer from June 29, 1894, to July 1, 1895; was a director from June 15, 1893, to January 24, 1894, and from August 1, 1894, to September 6, 1894, at that time serving under this temporary election that Mr. Lewis spoke of, evidently for the purpose of having him in at the time the tripartite agreement was under consideration, and at all times Mr. Bogardus, whether in one company or the other, or both, as he was for a long period, was serving under the directions and the supervision of Mr. Lewis.

As to another of the persons who appears by the testimony to have figured in the extraordinary accounting that was going on in the spring and summer of 1894, to wit, Mr. Thomas P. Swin, the records show that on January 6, 1893, Mr. Swin was elected assistant secretary and treasurer of the Brooklyn City, and that he held that office until March 8, 1894, when he was appointed secretary and treasurer, succeeding Mr. Bogardus, who had resigned on February 21, 1894. Mr. Swin continued to hold the office of secretary and treasurer of the defendant until his death, which was during the pendency of this action. So it will be observed that from January 6, 1893, up to February 21, 1894, he served as the assistant of Mr. Bogardus, and of course under the direction of Mr. Lewis. In addition to holding this position with the City Company on October 4, 1893, he was elected assistant

secretary and treasurer of the Brooklyn Heights Co., and remained in that position until April 11, 1894, about a month after it had developed, according to these disinterested officials, that the funds of the Brooklyn City applicable to conversion and construction, had become exhausted.

Now, to go back to Mr. Lewis' testimony. On pages 3289 *et seq.*, in answer to a question by Mr. DeWitt, Mr. Lewis testified that Mr. Swin became secretary and treasurer of the Brooklyn City on March 8, 1894, and that prior to that time, he had been in the Brooklyn City in various capacities for a great many years, and had been assistant secretary under Mr. Thompson and Mr. Bogardus. On page 3290, Mr. Lewis testified:

“Q. He kept the books of the Brooklyn City Company, did he not? A. Yes, sir.

Q. Under the supervision of Mr. Bogardus? A. Until he was elected secretary and treasurer of the Brooklyn City Company, and then he had charge of them himself, as I recollect.”

Bearing in mind the relations sustained to the Brooklyn City by Mr. Lewis, Mr. Bogardus and Mr. Swin, it is interesting to observe that they were the persons who investigated the books in the spring of 1894, to ascertain whether the funds of the Brooklyn City applicable to conversion and construction were “about exhausted,” to use the language of the time. At page 3291 Mr. Lewis testified, in answer to Mr. DeWitt:

“Q. Did you cause an examination to be made of ‘your’ books to ascertain the truth of the report of the General Manager? A. Yes, sir.

Q. Who made that examination? A. Mr. Bogardus supervised it.

Q. Mr. Swin assisted? A. Yes, I think Mr. Swin figured in it at that time, but I saw more of Mr. Bogardus, however, than of Mr. Swin.

Q. Did you look into the matter to any extent yourself? A. Yes, as far as was permitted

me to do at that time, sufficient to satisfy me of the correctness of these things as they proceeded.

Q. Did they make a statement of the accounts of 'your' company as they appeared upon the books? A. Yes."

Then follows a question and answer between counsel, which shows that the learned counsel for the defendant was as mixed as to whom Mr. Lewis represented as he was himself:

"Mr. Severance: Which books do you mean?  
Mr. DeWitt: The Brooklyn City."

At page 3293:

"Q. Were the books of the Brooklyn City Company examined to ascertain the verity of the report made in respect in the exhaustion of the funds to come from the Brooklyn City Company? A. That is my best recollection.

Q. Do you know who examined them? A. Mr. Swin and Mr. Bogardus jointly."

In another place Lewis testifies that to produce the alleged exhaustion of the funds, the plaintiff was charged with the journal entry of \$90,000, being part of a dividend paid before the lease was drawn or even contemplated (p. 3358), as well as other equally unjustifiable charges aggregating many hundred thousand dollars, which charges are fully discussed in another part of this brief.

It appears that the books of the Brooklyn Heights were examined by Mr. Bogardus and Mr. Noble, the chief bookkeeper, but that it would have been impossible to determine whether the moneys were exhausted from the books of the Brooklyn Heights, as those books would not disclose the amounts that had been paid from time to time on various contracts by the City Company direct. Therefore the only persons, so far as appears, who had access to the actual sources of information upon this subject, to wit: the Brooklyn City books, were Lewis, Bo-

gardus and Swin. These examinations were made in March and April, 1894 (page 3294).

At page 3298 appears this significant question and answer, Mr. Lewis being under examination by Mr. DeWitt, as to the meetings between the committees of the two companies. After stating that Mr. Leggett made a report to the Brooklyn Heights Company, which is rather extraordinary, considering that he represented the other party, we find this question and answer:

“Q. What, if anything, was said as to the condition of the fund to come from the Brooklyn City under the lease? A. I don't know if we went into that question seriously at that meeting.”

It was natural that they did not go into that question, as the Brooklyn Heights was without representation, being entirely in the hands of its adversary. As a result of this alleged examination of books, we have the tripartite agreement, and the giving of the note of \$308,000, and the other two notes aggregating \$350,000, which are claimed to be the result of an accord and satisfaction. In order to add respectability to this proceeding, it is urged that this business was done under the advice of eminent counsel, and Mr. Auerbach was put on the stand to testify that he represented the Brooklyn Heights Company, and he first showed his lack of recollection in the matter by stating that the examination made by Mr. Phelps covered an examination of the books of the City Company, as well as the Heights Co. At page 3505 he was put right about that by Mr. Trull, who said:

“Mr. Phelps' account—you are mistaken in that—does not refer to the Brooklyn City, it only refers to the Brooklyn Heights.”



At page 3524, on cross-examination, Mr. Auerbach testified as follows:

"Q. Now, going down to 1894, you testify that an account was stated by Mr. Phelps; you don't mean by that, do you, that Mr. Phelps ever made any examination to ascertain whether the Brooklyn City had paid over to the Brooklyn Heights or on its account the six million dollars provided for in the lease? A. To see whether that money had ever been expended?

Q. Yes. A. No.

Q. That was something Mr. Phelps had nothing to do with, wasn't it? A. He had to do with it to the extent of making a general examination to determine how much they had expended in order to see what the security would be in part for these collateral notes. If he made and stated any account certifying that the company had spent that money, I have no recollection of it.

Q. The fact is that what Mr. Phelps did was to take off from the Brooklyn Heights books a statement showing their expenditures, isn't that true? A. Yes.

Q. Which showed, among other things that the Brooklyn Heights had expended an amount in excess of a million dollars, for which it had not been reimbursed by the Brooklyn City? A. Yes."

At page 3526, he testified:

"Q. You, of course, never made any examination of these accounts yourself? A. No.

Q. You don't know how much money was expended, or how much was not expended, except as you heard it from some accountant? A. No.

Q. You knew Mr. Bogardus? A. Yes.

Q. And Mr. Swin? A. Yes.

Q. And Mr. Swin and Bogardus made up certain figures, didn't they? A. Yes, they were in conference with Mr. Phelps.

Q. At the time you assisted in the preparation of the tripartite agreement which you spoke of, you knew nothing else as to the state of

these accounts, except as you were advised by some of the parties in interest? A. My information was derived from their reports and conversations with them. I made no personal examination of the books.

Q. You never saw, did you, or never heard from any person that there was in existence any statement, either in the form of loose sheets or in the form of entries on the books of the Brooklyn City Company which showed on one side the six million dollars, and on the other side disbursements made against it? A. I don't remember.

Q. You never heard of any such so far as you recall now, did you? A. I have no recollection on the subject. \* \* \*

Q. At the time of these conversations in 1894, preceding the making of the tripartite agreement, you didn't know, did you, that the Brooklyn City Company was assuming to charge the Brooklyn Heights with dividends paid on the Brooklyn City stock prior to the date of the lease? \* \* \*

Q. Charge against the construction account?

A. No, I didn't know that, I have no recollection.

Q. You didn't know it was assuming to charge against the construction account sums paid as interest on loans back in 1892, before the lease was even discussed, did you? A. I have no recollection."

This testimony shows that Mr. Auerbach in this matter knew nothing of the facts with reference to these expenditures. This knowledge belonged to Lewis, Bogardus and Swin, and the Board of Directors of the Heights Company, controlled by their interest in the defendant caused no examination to be made for the purpose of determining whether the \$6,000,000 had been advanced as provided in the lease. Every material interest of these directors was in favor of the defendants. Even if they permitted the plaintiff to be defrauded through ignorance instead of design the contract is not

valid. The plaintiff was entitled to the services of a board vigilant in protecting it from loss.

At page 3142 will be found an extract from the minutes of a meeting of the board of directors of the Brooklyn Heights held on August 13, 1894, where the following resolution was passed, evidently with the intention of having something on the records which should show a semblance of fairness:

“On motion duly made and seconded it was resolved that the president appoint Messrs. Jenkins, Young and Bailey to confer with the Brooklyn City Railroad Company and to examine into the accounts between the companies so as to determine the amount of the so-called surplus fund, and the method of reimbursing or paying the same, with instructions to report to the board.”

No report appears in any of the records of the company, and for that there is a very good reason, which is, that the committee never met. Mr. Jenkins was called and testified as follows, pages 2807-8:

“Q. The records of the Brooklyn Heights Railroad Company, which have been introduced in evidence in this case show that on the 13th day of August, 1894, at a meeting of directors of the corporation a committee of three, consisting of Mr. Young, Mr. Frank Bailey and yourself, were selected to examine into the surplus account so-called, of the Brooklyn City Railroad Company. Will you state whether you ever served on any such committee? A. I did not.

Q. To your knowledge did your committee or any similar committee ever have a meeting?

A. I never knew of such a committee.

Q. Did you ever meet with such a committee?

A. No, sir.”

Mr. Bailey being called as a witness, had his attention called to this same resolution and was asked, at page 2740, whether he ever acted on any such

committee, and replied that he did not, and further testified :

“Q. I will ask you whether to your knowledge that committee ever acted or made the examination referred to or any examination of that character? A. I can only answer for myself, I know of no action of the committee.”

Mr. Hadden, on cross-examination, did away with his testimony on the direct-examination with reference to there being any accounting between the companies, as follows (pages 3530-1) :

“Q. You don't remember, do you, any steps being taken for an accounting between the two companies; that is, you have no recollection of it? A. No distinct recollection, no.

Q. Have you any recollection at all of there having been, either at the time the resolution was adopted approving the tripartite agreement, or any other time, a final settlement of accounts growing out of the reconstruction of the horse railroad into an electric railroad, between the Brooklyn City Railroad Company and the Brooklyn Heights Railroad Company? A. It is very indefinite about the tripartite agreement; I was there at the time it was framed, but I don't recall the time and the circumstances.

Q. I am not asking you about the agreement itself, but I am asking whether at that time or any other time, so far as you know, any final settlement of the accounts between the two companies growing out of the reconstruction of the horse railroad into an electric railroad, was had? A. I don't remember.

Q. Then you didn't intend by any testimony you gave here the other day to state that there was any such examination of accounts? A. No.

Q. You know nothing of it? A. No.”

It further appears that provisions of the lease which should have governed an accounting, if one had been made, were not only wholly ignored, but

were regarded by these Brooklyn City stockholders who were at the time in control of the plaintiff corporation, as being of no significance whatever. An inspection of Article IV of the lease shows that the defendant assumed without restriction the obligation of paying off its floating debt at the time the lease took effect, with the exception of any claims arising out of negligence. It further appears by the same section that the defendant was entitled to retain all moneys, credits and securities on hand, so far as necessary at that date, for the purpose of making such payments, and the payment of taxes and rentals, and if anything remained from such moneys, credits and securities, it was then entitled to retain the same on account of its book surplus, if any, *but that is the only provision in the lease which authorizes the retention of any moneys on account of such surplus. In Article V, which provides for the expenditure of the six million dollars, being the proceeds of stock and bonds to be issued and used in conversion and construction, there is no word which authorizes a deduction from that sum, of the said surplus or any other amount whatever.* It is clearly established that these provisions of the lease were absolutely ignored, and the defendant assumed the right to readjust its accounts without reference to dates, to pay its debts irrespective of whether they were incurred after the lease or prior thereto, to distribute among its stockholders or retain in its treasury several hundred thousand dollars as an alleged surplus, to balance its supply account by charging construction over \$365,000 without a scrap of paper to show that such charge should have been made, to charge against the said account dividends that had been paid out before the lease was signed, as well as to make the other fictitious charges discussed in another part of this brief, and thus invade and divert the fund which

it had by solemn instrument in writing set aside for the purposes of conversion and construction, and upon \$3,000,000, on which as rental the plaintiff is paying 10% per annum, and upon the remaining \$3,000,000 represented by bonds of the defendant the plaintiff is paying the interest (p. 3439). The undisputed evidence in this case warrants us in asserting that these gentlemen proceeded exactly as though no lease had ever been made. No distinction was made between lessor and lessee, but all of the funds, no matter from what source they arose, were treated as subject to defendants' disposition untrammelled by any contracts or engagements whatever. They assumed to treat the business as a continuing one, and the change in operation from lessor to lessee is merely colorable, without even opening an account of this \$6,000,000 fund on their books. But the innocent people who bought the Long Island Traction securities, and their successors, are entitled to have the rights of these two companies adjusted in accordance with honest bookkeeping and upon the basis of the written instrument which is the only contract that the law recognizes.

That we have not over-stated the action of these parties is demonstrated by the testimony given by the witnesses for the defendant as well as by the records and books. It is now claimed by the defendant when driven to the necessity of admitting that some of the provisions of the lease must be complied with, that the date of the cut-off as between lessor and lessee should be the 15th of February, instead of the date the lease took effect, as provided in the instrument, but Mr. Lewis testified at pages 3338-9, when he was being interrogated with reference to the manner in which the accounts were kept after the 15th of February, as follows:

“Q. You have no recollection, have you, of any cut off being made so as to distinguish between the work that had been done previous to



the date of the lease and the work done after the date of the lease? A. No, there was no necessity for it, as I recall it."

On page 3399 he gives this significant testimony:

"Q. Do you remember that any account was opened showing disbursements separately before and after the 6th of June, or was it all carried right along in the same account? A. It was all carried along in the same account, and susceptible to dissection at any time.

Q. Was the operation carried right along? A. Yes, sir.

Q. Operation by the City Company ceased on the 6th of June, 1893, didn't it? A. Yes—that is, you mean the superintendence or administration of the operation?

Q. Yes. A. Yes, sir.

Q. Now, as to receipts from earnings, fares taken in, there was no new account opened on the 14th or 15th or 16th of February, or at any other time? A. No, sir, for the reasons already given."

At pages 3348-9, Mr. Lewis, after having testified that the funds of the City Company had become exhausted in the spring of 1894, gave the following testimony:

"Q. Did you deduct from the six million dollars—I don't mean for the purpose of exhausting the fund, but with the result of exhausting the fund, any obligations of the Brooklyn City Co. on account of materials and labor that went into the construction or conversion prior to the date of the lease? A. I shall be unable to answer that question without examining the accounts.

Q. Did you understand, at the time, that you had the right to make such deductions? A. I think I understood we could do just as we pleased about that."

This is evidently a very accurate exposition of the attitude of these parties, although the lease itself is specific with reference to the payment of its

debts by the defendant at the date the lease took effect.

At page 3351 Mr. Lewis testified :

“Q. As you understood the matter at the time you were president of the Brooklyn City Company and in the spring of 1894, when you stated the funds were exhausted, the Brooklyn City Company had the right to retain that surplus, deducting it from any funds whether arising from moneys, credits and securities on hand or from the six million dollars proceeds of stock and bonds agreed to be paid over to the lessee for use in conversion, that was your understanding, wasn't it? A. At the time you speak of in 1894 I don't know whether the Brooklyn City Railroad Company had enough money to retain its surplus.

Q. You don't understand my question, I think. I am asking you as to your understanding of their rights? (Question repeated.) A. If it were possible, yes, if they had it to retain.

Q. You understood—assuming for the sake of the question that there was \$250,000 in round figures on hand in cash, money on hand at the time the lease was dated, as you have stated—that you had the right to take that \$250,000 and add to that the six million dollars afterwards received from the sale of the stock and bonds, and deduct from that total the surplus account as it appeared on the Brooklyn City books in arriving at the amount due to the lessee under the lease? A. No, I think there were other things which you would have to consider in addition.

Q. I mean that among other things you had a right to deduct that among other deductions? A. Yes.

\* \* \* \* \*

Q. The Brooklyn City Company did as a matter of fact get that surplus or retain it and distribute it? A. Eventually, yes. They haven't entirely distributed it yet.”

At page 3354 Mr. Lewis, having already testified that it was his recollection that the surplus on the

15th of February was somewhere between \$500,000 and \$900,000, testified as follows:

“Q. In what form was that surplus; was it in the form of cash in the treasury? A. The books will give you that also.

Q. If you only had \$250,000 in round figures in the treasury on the 15th of February, it is clear, isn't it, that the surplus of \$500,000 to \$900,000 could not have been in cash? A. It could be very readily in cash, yes, sir.

Q. How could it be if you only had that much money on hand? A. Borrow it, borrow the money and your surplus would become cash or you could sell securities and your surplus would become cash.

Q. So you could sell real estate and the surplus would become cash on the same basis? A. Yes, sir.

Q. Then, as you understood it, at that time this surplus might be either in cash or real estate or equipment or horses or harness or in capital? A. On the 6th of June?

Q. On the 15th of February or the 6th of June, or at any time? A. Either, certainly.

Q. And you understood that under the terms of the lease if that surplus was not there in money, credits or securities you had a right to sell property sufficient to equal the amount of surplus, reduce it to cash? A. Yes, you could have done any of those things under the lease.

Q. And that was your understanding at the time and still is? A. Yes.”

In view of the fact that the defendant is by the terms of the lease only entitled to deduct its surplus from moneys, credits and securities on hand at the date the lease takes effect after payment of its debts, taxes and rentals, and that the proceeds of the sale of real estate are without any diminution for any purpose specifically devoted to conversion and construction, and that all equipment, horses and harness are in terms leased to the plaintiff, we have here another demonstration of the impropriety of permitting these Brooklyn City stock-

holders, who were in control of the plaintiff, to conclude the plaintiff by any juggling of accounts.

At pages 3374-5, we have another luminous statement from Mr. Lewis, showing that these gentlemen were entirely superior in their conduct to any limitations imposed by the lease. He testified as follows:

“Q. You know in the work of conversion and operation beginning back in the summer of 1892 and running along down to the time you turned over the property on the 6th of June, 1893, you were always continuously buying supplies and materials and equipment, weren't you? A. Yes, sir.

Q. You did not pay for that until after it was delivered in any case, did you? A. Not that I am aware of. As I told you before, I don't know. I didn't keep track of deliveries at all.

Q. When you paid for this material, this equipment which you owed for on the 6th of June, 1893, you charged all such payments against the Brooklyn City construction account? A. Up to June 6th?

Q. Yes. A. Yes, I think so, everything that was a proper charge to conversion or construction was charged to that account when it was paid.

Q. And that was charged without reference to when the materials, equipment, or whatever it was, was received by the Brooklyn City Co.? A. So far as I know, yes.

Q. You understood at that time, that you were within your rights under the lease, when you did that? A. Yes.”

At pages 3405, *et seq.*, Mr. Lewis on cross-examination was being interrogated concerning certain testimony that he gave before a legislative investigating committee in 1895. An answer that he had given at that time was read to him, as follows:

“A. For instance, the Brooklyn City Railroad Company at the time it made this lease

had over 6,000 horses, which it was proposed to sell; you might say that the surplus which was between \$600,000 and \$700,000 was in those horses. Now, in addition to that, it had \$900,000 of useless real estate which under the terms of the lease the proceeds from the sale of that was to be devoted to the conversion of the road and the extension of the same, so that there was personal property and real estate more than sufficient to provide not only say \$900,000 as I have before testified for the purpose of conversion, but providing also for the distribution of the whole of the surplus of the Brooklyn City Railroad Company to its stockholders if the directors found it desirable."

Mr. Lewis said that he so testified, and that it was a correct answer.

A little later on the following answer, given to the legislative committee, was read to Mr. Lewis, and he stated that it was a fair explanation of the condition of the surplus as he understood it:

"A. Suppose you take \$900,000 from \$1,075,000, suppose you take \$875,000 and appropriate that to the conversion of the road, that would leave \$200,000 to be applied to the surplus (Mr. Lewis had already testified in the legislative investigation that there was real estate of the City Company that could be sold worth \$875,000 and personal property in excess of \$200,000), if you please, or distribution of the surplus. It may be in cash, notes, securities, it may be in anything, but this you can rely on, that there was sufficient money or property not only to pay for the surplus, or the distribution of it to the stockholders of the Brooklyn City, but whatever was left, and only whatever was left, could the Brooklyn Heights get after the disposition of any property for the purpose of conversion and extension."

This shows that at a date within a year after the transactions in 1894, Mr. Lewis took the same position that he has since, and in spite of the fact that

all the property of the corporation was leased, most of it by specific mention, and that the only authority to pay the surplus was out of moneys, credits and securities on hand, he construed the lease to authorize the surplus to be made good to the Brooklyn City Co. under all circumstances, whether it had to be raised by the sale of the property which had passed under the lease, or in any other way.

At pages 3389-91, there appears a letter addressed to Mr. Lewis by Mr. Rossiter, his successor, as president of the Brooklyn Heights R. R. Co., inquiring as to the manner in which the amounts of \$308,340.35 and \$347,000 referred to in the tripartite agreement, were arrived at. In that letter Mr. Rossiter uses this language:

“As I understand it the proceeds of Three million dollars of stock and Three million dollars of bonds were to be expended by the Brooklyn City Company for conversion or construction purposes, and the amount actually turned over to the Heights Company for such purposes was, as our books show, about \$4,500,000, of which \$656,340.35 was paid back in the two notes above mentioned. It would seem, therefore, that out of the Six million proceeds of stock and bonds of the Heights Company received the benefit of about \$3,900,000, and the remainder presumably was expended by the City Company, but how did it happen that the Heights Company and Traction Company gave their notes for the \$656,000, and how were those figures arrived at or upon what theory were they presumed to be a debt of the Heights Company to the City Company?

In answer to that Mr. Lewis wrote a letter, under date of August 23, 1897, addressed to Mr. Rossiter, which appears at pages 3391, 3393. From that letter we quote the following:

“I am not technically familiar with the accounts of the Brooklyn Heights R. R. Co. All matters pertaining to these details were left



with the secretary and treasurer, Mr. W. A. H. Bogardus. I am sufficiently well informed, however, to say that there could be no possible bookkeeping arrangement which would show the details which were essential to determine the amounts that the Brooklyn Heights R. R. Co. could claim as advances from the Brooklyn City R. R. Co. under the terms of the lease. The details necessary were taken from the Brooklyn City R. R. Co. books as the lease provides, namely, the proceeds of the sale of the Brooklyn City R. R. Co.'s stocks and bonds at par, less the disbursements of the Brooklyn City R. R. Co. from such funds *before the lease and before the delivery of the property of the lessor company under the lease, and less the surplus of the lessor company at the time the lease became operative.* These are the foundations and facts which were used in determining the amounts that should have been advanced by the Brooklyn City R. R. Co. to the Brooklyn Heights R. R. Co."

Mr. Lewis testified that the letter correctly set forth the facts as he understood them (p. 3393).

We have in this letter a summing up of what appears from the accounts themselves, namely, that instead of devoting the Six million dollars to the purposes provided by the lease, those funds were devoted to uses not only not authorized by the lease, but in direct violation of its provisions. And still the defendant says because this was permitted and done by its representatives who were in control of the plaintiff at the time, there was an accord and satisfaction, and we cannot go behind it. If the defendant could in this manner appropriate one-third of the sums it had agreed to devote to conversion, and upon which sums as rental, 10% per annum being paid by the plaintiff, it might as well have retained the whole of it. That Mr. Lewis in advancing these views and in conducting the financial performances heretofore commented on, was merely a representative of all the persons concerned, is dem-

onstrated by the testimony of other witnesses. Mr. Merritt, who succeeded Mr. Lewis as president of the Brooklyn City Company, and who is still the president of that company, testified at page 3438:

“Q. You did proceed, however, on the theory that irrespective of the moneys that might have been on hand at the date of the lease or at the time the property was turned over to the Brooklyn Heights, the City Company had the right to retain out of any funds or any proceeds of stock and bonds, or anything else in its hands, the total amount of the surplus, and distribute that to its stockholders? A. Yes.”

Mr. Leggett at page 3469 testified:

“Q. In making this so-called adjustment you took it for granted, didn't you, that the Brooklyn City had the right to retain its entire book surplus? A. I didn't take anything for granted; went over the accounts and figures and ascertained the best way we could, which was agreed upon by both companies; the surplus was fixed, understand.

Q. That was fixed as a matter of fact, at your so-called book surplus? A. I don't know how to answer that; it was our book surplus or our actual surplus, whichever way you are a mind to term it.

Q. You made this so-called adjustment, did you not, on the assumption that under the lease you or the Brooklyn City was entitled to have in cash its entire surplus? A. That is my recollection of it, yes.”

In the appendix “A” hereto attached and made a part of this brief will be found list of authorities, together with quotations from a considerable number of the same which clearly demonstrate that under the facts appearing here the plaintiff corporation is not bound by any so-called accord and satisfaction entered into by the directors in office in 1894, even had they made any such alleged settlement.

**Detailed discussion of Point VII showing that the issue raised by the defendant in its answer that the plaintiff is not the owner of the claim, demand or cause of action set forth in the complaint, nor of any part thereof, finds no support in the testimony, documentary or oral.**

This claim assumes (1), that whatever sums of money were advanced by the plaintiff for and on account of the conversion of the leased railroads into an electrical system, were advanced after the exhaustion of the conversion funds provided for in the lease, and that such advance created a demand against the lessor company which was due and owing and in existence in August, 1894; that by the terms and provisions of the collateral trust indenture, so-called, executed by the Long Island Traction Company, and by the plaintiff to the New York Guaranty & Indemnity Company, as Trustee, to secure the payment of the collateral trust notes, the cause of action sued upon herein was assigned to the Trustee therein; that the title and right to enforce the same thereby became vested in the Trustee, and from August 1st, 1894, the date of said trust indenture, the plaintiff has not been the owner or holder, or entitled to enforce the claim in suit against the defendant or against any other person.

(2) That default was made in this trust indenture, the same was foreclosed, and upon a decree of foreclosure and sale, the properties and interests covered thereby, including the cause of action sued upon, were sold, bid in by one Jenkins, and by Jenkins transferred to the Brooklyn Rapid Tran-

sit Company, a corporation existing under and by virtue of the laws of the State of New York, and thereby said right of action passed to and became the property of the Brooklyn Rapid Transit Company.

(3) That after such sale, as aforesaid, the Brooklyn Rapid Transit Company, for the purpose of securing the payment of an issue of bonds in the amount of \$7,000,000, made and executed its indenture of trust, whereby it is insisted it sold and assigned to Central Trust Company of New York, as Trustee, the claim and demand here sought to be enforced against the defendant, together with other property described in said indenture or mortgage; and that the said last mortgage and bonds issued thereunder are now outstanding and unpaid, and that the Central Trust Company of New York is now the legal owner of said claim, as Trustee, for the payment of the bonds secured to be paid thereby.

The claim thus asserted is but a part of the obstructive tactics pursued by the defendant to avoid payment of the just obligations it had stipulated to pay pursuant to the terms and provisions of the lease.

An examination of the facts will show that it cannot commend itself to the Court. A proper answer to the claim requires a consideration of the terms of the lease and of steps which have been taken thereunder. When these are thoroughly understood and the terms of the respective documents relied upon by the defendant are stated in connection therewith, it will be found that this claim vanishes into thin air.

So far as material to the present question, the provisions of the lease which require consideration and construction, are Clauses IV, V, XXI, XXII, X, XXIII, XXIV, XI, XLV, XII, XXV, XXVIII.

By the provisions of paragraph IV, the lessor covenanted, after making certain deductions therefrom, to apply all moneys, credits or securities on hand at the date when the lease should take effect, and the proceeds thereof, to the cost of converting the railroads of the lessor into an electric railroad, or such other kind as should be authorized by law.

By the provisions of paragraph V the lessor covenanted to issue \$3,000,000 of its capital stock then unissued, but authorized to be issued, and to dispose of same at par. Also \$3,000,000 of its bonds, unissued, but authorized to be issued, and apply the proceeds, \$6,000,000 in cash, to the same purpose as it covenanted to apply the moneys, credits and securities provided for in paragraph IV.

It seems clear from these two provisions of the lease that distinct and separate items of money and securities were contemplated as being in existence and owned and possessed by the defendant. This is the clear expression of Paragraph IV, for unless such moneys, credits and securities were on hand and owned by the defendant there would be no necessity for making provision therefor in this paragraph of the lease. The bonds and stock described in Article V were all to be issued and the proceeds used for the benefit of the defendant subject to no deduction, save premium which might be realized on a sale of the bonds, and the whole of the sums provided for in these two paragraphs were to be applied by the defendant for the contemplated conversion of the leased railroads into an electric or other system. Indeed, most careful provision is made by the defendant in other provisions of the lease to insure two things; first, that the funds and securities provided for in paragraphs IV and V should first be expended for the conversion of the railroads, and, second, until so expended the plaintiff was not authorized to expend moneys of its own, either for the conver-

sion of the railroads into an electric system, or to construct extensions, additions and betterments, but it was limited in this respect to the payment of such moneys as should be necessary to keep said railroads and property in good condition and repair, and preserve efficiency in the operation of the leased railroads.

Thus by the provisions of paragraph XXI of the lease, the lessee is compelled to covenant and agree that it will not make or construct any extensions, additions, branches and improvements, or furnish equipments to said railroads and property and pay for the same "out of its own funds", until the unissued stock and bonds of the defendant shall have been expended, as provided for in the lease, and the inhibition goes so far as to prohibit the lessee from constructing, or applying for the right to construct, any extensions or branches without first obtaining the consent of the defendant in writing. The purpose of this provision was evidently intended to secure the conversion of these railroads into an electric system, preserved in its entirety as such as security for the return to the defendant of the very large sum reserved as rental and not embarrass such situation by any expensive system of new construction or extensions which might exhaust the funds of the plaintiff, and thus prevent it from fulfilling the terms and conditions of the lease.

These clauses of the lease speak in no uncertain terms that the moneys for the conversion of these railroads should issue from the defendant in the amounts provided and should be applied to this specific purpose before further construction should be entered upon. This intention is made still more manifest by the provisions of Paragraph XXII, in which the plaintiff covenants to proceed faithfully



and diligently with the work of converting the said railroads into an electric railroad :

“And that in the event that the said moneys belonging to the lessor on hand at the date this lease takes effect, after the deductions aforesaid, and the proceeds of said work and bonds of said lessor, authorized to be issued but unissued, shall be insufficient to pay and discharge the cost of converting said railroad and railroads of the lessor into an electric railroad, \* \* \* that then and in that event the lessee will forthwith furnish and supply all such sums of money, materials and supplies as may be requisite and necessary for that purpose, and will proceed faithfully and diligently with the work of construction and converting said railroad and railroads into an electric railroad, \* \* \*.”

It is the inevitable construction of the foregoing provisions of this lease, and none others impair such construction but aid it as we shall hereafter see, that the intention of the parties was to provide a specific sum of money to be expended by the defendant for the purpose of conversion of the leased railroads, and until such sum was furnished by the defendant and applied to such purpose there was no authority in the plaintiff to expend a single dollar upon the cost of such conversion from “its own funds,” and, as we have seen, plaintiff was limited by particular provision in the expenditure of any moneys of its own for any purpose than that of maintenance and of securing efficiency in operation.

It is quite evident that the defendant intended by these explicit provisions to keep the cost of conversion of the railroads within its own hands and under its own control, so that it might, if possible, secure a complete conversion limited in cost to its moneys and proceeds of securities which it stipulated to furnish and not be embarrassed at any future time by any claims set up by the plaintiff for expenditures of moneys from its own funds before the plain-

tiff had applied the funds which it was obligated to provide.

It is quite true that in practical operation under the terms of this lease that the plaintiff made and entered into contracts for the conversion of these railroads and that in the discharge of such obligations it paid sums of money to contractors, but this method was not regarded by either of the parties to the lease as paying for the cost of conversion from the funds of the plaintiff. They were mere advances rendered necessary by the method adopted in the performance of the lease, and were so regarded by the defendant.

It does not seem to be needful to fortify this construction of the provisions of the lease, but the construction thus placed upon these provisions is abundantly sustained by other provisions. Paragraph X provides:

"The lessor further covenants and agrees that in the event of the expiration of this lease, or other sooner termination thereof, it will pay to the lessee the actual cost of all property, extensions, branches, additions, improvements and equipments made, acquired and paid for by said lessee out of its own funds for use in connection with the operation of the railroads of the lessor, less the cost of such part thereof as was required to preserve said railroads, extensions, additions, improvements and equipments in good repair and serviceable condition, and less the cost of such part thereof as was necessary to preserve and secure efficiency in the operation of said railroad."

This clause establishes in explicit terms for what the defendant is to pay upon the expiration of the lease or its earlier termination and for what property it is to pay.

It excludes all cost of conversion of these railroads no matter from what source the funds therefor had been derived which had been advanced by

the defendant. It embraces all cost of conversion of the property into an electrical system, together with the cost of all extensions, branches, additions, improvements and equipments paid for by the plaintiff "out of its own funds." The plaintiff could not create any obligation against the defendant for moneys expended of its own for anything which the proceeds of the moneys to be supplied by the defendant would pay, assuming that out of such moneys on hand, or the proceeds of the securities, or the stock and bond issue, or the proceeds of real estate and the sale of personal property it had actually been supplied by the defendant. This is illustrated by other provisions of the lease. Thus by the provisions of Paragraph XXIII it is covenanted that at the expiration of the lease, or upon any sooner termination, all the property, &c., furnished by the lessee "out of its own funds" to the railroads or properties shall be and become the property of the lessor upon the payment by it of the cost thereof "as in this lease provided."

By Article XXIV the lessee covenants to deliver to the lessor, upon a like condition as in the last clause, all materials and supplies on hand for use in the construction, maintenance and operation of said railroads, which shall be paid for by the lessor at their cost price and it shall execute and deliver to the lessor a good and sufficient deed of the property acquired in connection with the railroads upon payment of the cost price thereof, as in this lease provided. These clauses of the lease were to meet Clause XI where the lessor agreed to transfer and deliver to the lessee, at the date the lease took effect, all supplies and materials then on hand for use in connection with the construction, maintenance and operation of the railroad upon payment by the lessee to the lessor of the cost price thereof, which payment the lessee agreed to make upon such transfer and delivery. They were reciprocal covenants re-

lating to the same matter; the plaintiff paying when the lease took effect and the defendant paying when the lease terminated.

The XLV Paragraph of the lease provides that all real estate, the continued use of which is not required for the maintenance or operation of said railroad or railroads, extensions or branches, may be sold, with the written consent of the lessee, and the proceeds expended for the same purposes as the proceeds of the stock and bonds of the lessor.

The fact that the proceeds of real estate provided for in Paragraph XLV of the lease, and of personal property, as provided for in Paragraph XII, were to be devoted to conversion of the railroads and to other purposes, is made clear by practical interpretation of the parties. In the third recital of the tripartite agreement is stated an assumed indebtedness of the Heights Company to the Brooklyn City Co. for the conversion of the demised railroads and the equipment of same "in anticipation of the sale of certain real estate and personal property of the Brooklyn Co. which under the terms of the lease were to be sold and the proceeds applied to such electrical construction and equipment."

Paragraph XII authorizes a sale of personal property not required for further use in the construction, maintenance or operation of the railroads, and the proceeds realized therefrom should be devoted to the construction of such "extensions, additions and equipments of said railroads as shall be approved by the lessor, and not otherwise, which said extensions, branches, additions and equipments shall be the property of the lessor."

In Paragraph XXV the lessee covenants that at the expiration or sooner termination of the lease to surrender to the lessor "all property, additions, improvements and equipments which shall be furnished, constructed or completed out of the proceeds of the stock or bonds of the lessor, or moneys advanced

by the lessor subsequent to the delivery of this lease, or from the proceeds of sale of property of the lessor equal in value and in as good condition as when so furnished and constructed and completed; reasonable wear and tear excepted."

And by Paragraph XXVIII the lessee covenants to keep and maintain, at its own expense, the personal property and rolling stock received, to supply new cars, tools, implements, machinery and equipments, and to maintain, at its own expense, the railroads in good condition and effective working order.

It is clear beyond argument upon reading all of these clauses of the lease together, that the purpose was, upon the part of the defendant, to provide moneys and the proceeds of securities and property for the conversion of the leased railroads into an electric or other system, as may be agreed, and that such property should be and remain the property of the defendant to be returned to it upon the expiration or earlier termination of the lease without any compensation whatever to be made by the plaintiff to the defendant therefor.

For the property acquired, and cost, either for the conversion of the railroads into an electric system, or such other property as was acquired by the plaintiff for use in and about the railroads thus leased and which was paid for "out of its own funds," the defendant was to make compensation based upon the amount advanced by the defendant and the cost of the property which was acquired, at the termination of the lease.

It does not seem possible to construe the provisions of this lease so as to embrace within the phrase moneys advanced "out of its own funds" any other sums of money than such sums as it advanced after the defendant had made application of all of the moneys which it had agreed to advance from whatever source such moneys were to come. So care-

ful was the defendant in this respect in formulating the provisions of the lease that it placed a prohibition upon the plaintiff from applying its own funds for any of the purposes of conversion, extension, etc., until all the moneys which the defendant was obliged to furnish had been applied, or unless it gave its express consent, in writing, thereto.

There is no provision in any of the clauses of the lease that imposes an obligation upon the defendant to advance any money before an obligation had been incurred for the purposes for which the money was to be furnished, and it is evident that the parties intended that the obligation should be first incurred by the affirmative act of the plaintiff and should be thereafter discharged by the application of moneys furnished by the defendant. In the course of this process, as we have before observed, the method adopted was for the plaintiff to incur the obligation and discharge the same and make requisition upon the defendant for the money to reimburse it. Such method, however, did not contemplate that the advances thus made by the plaintiff were to be regarded as moneys paid "out of its own funds." On the contrary, it was but fulfilling the terms and conditions of the lease which required it to be diligent in the conversion of the railroads to an electric system, and this required the making of contracts and the incurring of obligations and the defendant contemplated, by not providing that it should advance the moneys before the obligation was incurred, that this should be the process adopted and the method which thus obtained was a practical interpretation of the contract of lease and it of necessity excludes any theory that the plaintiff was advancing moneys "out of its own funds" when it preliminarily paid the obligations thus incurred.

This action is for damages incurred by reason of the refusal of the defendant to repay out of the con-



version fund provided by the lease expenditures so made by plaintiff, and has no relation to the fund payable "at the termination of the lease," which was the fund mortgaged.

That this is the correct construction of these provisions of the lease is also emphasized by the fact that in the tripartite agreement which was executed after the Traction Company mortgage to the Guaranty & Trust Company, it was expressly provided that the proceeds of sale of real estate and of personal property should be used for the purposes of conversion of the road, and also for extensions and additions, even though at this time it was incorrectly assumed that the proceeds of stock and bonds and moneys on hand had been applied, and if these moneys could be applied, as the parties contracted they might be, it was in direct contradiction of the fact that the plaintiff had parted with all right and title thereto.

The same thing is true of the judgment rendered in the action brought by the plaintiff against this defendant, which involved, among other things, the application of the proceeds of real estate which the plaintiff claimed, and which the defendant refused to pay over. It was therein distinctly adjudicated that the plaintiff was entitled to be credited with such sums of money as it had advanced upon the contracts for betterments in connection with the railroads, under the terms and provisions of the lease, and it was necessarily decided therein that the plaintiff then had title to such money by reason of the advances which it had made, and that the defendant was bound to pay such moneys to it. No claim was made therein that the plaintiff did not have title to these moneys, and such claim is evidently an afterthought opposed to the terms and conditions of the lease, the practical interpretation placed thereon by the parties, and the solemn

adjudication of the Court (B. H. R. Co. vs. B. C. R. Co., 124 App. Div., 896). It follows that there could be no debt existing in favor of the plaintiff against the defendant arising out of temporary advances of the former upon the cost of construction, within the meaning of the mortgage indenture and the lease, until the whole of the money which defendant was obligated to furnish had been by it applied. Payment "out of its own funds" would not and could not arise until such event had happened and as this point was never reached the debt which it was supposed might exist at the termination of the lease did not have an existence.

**Neither the trust indenture, dated August 1, 1894, between the Long Island Traction Company and the Brooklyn Heights R. R. Co. and the New York Guaranty & Indemnity Company, Trustee, nor the Brooklyn Rapid Transit Company's mortgage of October 1st, 1895, to Central Trust Company of New York, Trustee, nor the mortgage of the Brooklyn Rapid Transit Company to Central Trust Company of New York, Trustee, dated July 1st, 1902, in anywise impaired or affected the title to the cause of action in the plaintiff as set out in the complaint, nor does any other writing or act have such effect.**

The provisions of the Long Island Traction Company indenture to the New York Guaranty & Indemnity Company, trustee, so far as it assumes to mortgage the construction account existing between the plaintiff and the defendant, is found in Paragraph IV of that instrument and reads as follows:

“IV.—All the right, title and interest of the Heights Company in and to the amount of the cost of all property, extensions, branches, additions, improvements and equipments, heretofore and hereafter made, acquired and paid for by said Heights Company out of its own funds, for use in connection with the operations of the railroads of The Brooklyn City Railroad Company, less the cost of such part thereof as shall or may be required to preserve said railroads, extensions, branches, additions, improvements and equipments in good repair and serviceable

condition during the existence of the lease hereinbefore mentioned from said The Brooklyn City Railroad Company, as lessor, to said Heights Company, as lessee, and less the cost of such part thereof as shall or may be necessary to preserve and secure efficiency in the operation of such railroads; *such cost, as aforesaid, being payable under the terms of the lease above mentioned by said lessor company to said lessee company, in the event of the expiration of said lease or other sooner termination thereof.*"

This mortgage was introduced by the defendant and appears at page 3623 of the minutes.

It is scarcely a debatable question as to what fund was intended to be covered by this recital in the mortgage. The language is a paraphrase of the provisions of Paragraphs XXIII and XXV of the lease, and is an actual and accurate description of the fund which, in a contingency, might be payable thereunder.

Paragraph XXIII says what shall be paid for, which is the property which shall have been provided "out of its own funds." And Clause V relates, among other things, to the deductions from the amount that shall be paid. Both clauses in these respects are contained in this recital, and to make assurance doubly sure as to what was intended to be covered by the recital, the language is: "such cost, as aforesaid, being payable under the terms of the lease above mentioned by said lessor company to said lessee company, in the event of the expiration of the lease or other sooner termination thereof." Here provision is distinctly made for two specific things. First, the existence of a fund due and payable by the defendant by reason of the advances made by the plaintiff out of its own funds for particular purposes specified. Second, that such fund shall be payable upon the expiration of the lease or other sooner termination thereof.

As we have seen, no such fund could be in existence or come into existence prior to the application of the proceeds of the moneys, securities, stock and bonds provided for in Clauses IV and V of the lease, and also the application of personal property and the proceeds of sale of real estate in other provisions of the lease already fully set out. The defendant, by express provision, prohibited the creation of any such fund by Clause XXI of the lease. As we have already seen, such fund could only be created after the application of all of the moneys which the defendant had obligated itself to furnish. It was not a debt that was to be mortgaged, it was a right under a lease whereby, in a certain contingency which might or might not ever happen, the plaintiff might become entitled to have and receive from the defendant a sum of money. Such sum, however, was only to be determined after there had been an application of all the moneys which the defendant was required to furnish, and after deductions had been made therefrom as was provided for in the lease. If then any property right or interest was found to exist in the plaintiff to that property right or interest, the mortgage attached. This mortgage was made with full notice of the terms and conditions of the lease. It was matter of record. All of the parties in interest, save, perhaps, the trustee, who was chargeable with notice, had actual notice of the terms and conditions of the lease. They were, therefore, chargeable with the fact that no fund could be created within the terms of the description contained in the mortgage, except the fund payable at the termination of the lease. They were also chargeable with notice that the defendant's rights in the premises were to be protected and that it had by particular and specific provision, many times reiterated, reserved to itself the right to make application of these moneys which it was obligated to furnish, and so making application

of it that no debt or obligation could, by any possibility, come into existence until after the sums of money agreed to be furnished by the defendant had been furnished and applied pursuant to the terms and provisions of the lease.

Under these circumstances it is most unreasonable to attempt to make construction of a provision which will distort and destroy the operative provisions of the lease and bring into existence a debt which the parties themselves did not contemplate, and which, by express provisions, they had contracted against.

Much stress has been laid by the defendant upon the language of the recital in assigning "all the right, title and interest of the Heights Company in and to the amount of the cost of all property, extensions, branches, etc., heretofore and hereafter acquired, and paid for by said Heights Company out of its own funds," etc., the argument being that this language is broad and comprehensive and embraces all debts and obligations of every form which may be due or owing by the defendant to the plaintiff. Such argument would have force if the instrument operated to assign a debt, claim or demand in the ordinary relation which had an existence at the time of assignment; then, of course, the language would be broad enough to cover it and undoubtedly would convey it. But the difficulty with the situation is that the recital specifically defines what the thing is which is assigned, how it shall be created and how it must exist in order to be covered by it, and unless these elements be found to exist the language of the assignment, however broad, does not embrace it, for the reason that it was never intended to apply to it. The use of the words "heretofore acquired" have, when applied to the situation, a distinct and well meaning significance.



Had the defendant at the time when this assignment was made furnished the full amount of money that it was obligated to furnish and it had been expended in manner as provided for in the lease, and in addition thereto the plaintiff had from its own funds paid the remainder of the cost of converting the railroad of the lessor into an electric road, or for necessary extensions and for other things, as provided for in the lease, then the language "heretofore acquired" would apply and cover such sums. It would not then be due and payable nor would the defendant then be obligated to pay it, but it would exist and so existing it could be mortgaged, but its payment could only be had at the expiration or other termination of the lease, and until that and other conditions had been determined it would not be known whether any claim or demand existed in favor of plaintiff at the time or subsequently to the execution of the mortgage. So that the argument which would find application if the advance existed as an ordinary debt subject to no provisions of the lease limiting conditions under which it could be created must, where such contingency exists, fall to the ground.

It is suggested that as the expiration of the lease was for a period of 999 years, unless sooner terminated, that there was scarcely anything of value to mortgage. We are not now concerned with this question. It is sufficient to say that whether the contingency in which a fund might be created was of great or little value is quite aside of the question here. That question is what was the fund which was intended to be covered by this mortgage, and as to that but one answer can be returned, that it was the fund advanced by the plaintiff which should be found to have existence upon the expiration or other termination of the lease. There could have been no intention upon the part of the parties to mortgage payments by plaintiff in excess of

amounts to be repaid by defendant out of conversion funds, prior to the exhaustion of such funds in accordance with the terms of the lease. No accounting had been made of the conversion funds provided by the lease; it was assumed that plaintiff either already had made, or would in the future make advances in excess of such conversion funds out of "its own funds," which would be payable by the defendant "at the expiration or sooner termination of the lease," and such excess advances were mortgaged. It was not known at that time that the defendant had failed in the performance of its obligations under the lease; consequently it was not known that there was any demand of any character in existence which might be mortgaged. That was not discovered until over two years after the mortgage was given (see testimony of Colonel Williams, page 2827. When the fact was discovered the plaintiff made immediate demand of the defendant for payment, and there never has been any suggestion from anybody that it did not have the right to receive this money and make application of it, as provided by the terms and conditions of the lease, until the defendant, through dire necessity, laid hold of it as a straw to save itself from drowning. The parties could scarcely have contemplated the mortgaging of property, no matter what its nature, which it did not know, and had no reason to suppose, existed.

It seems evident, therefore, that no means of saving grace can be extended to the defendant by reason of the execution of this mortgage, either from its recital or from any other circumstance.

The claim and demand, the subject of this action, not having been covered by the mortgage the decree of foreclosure based thereon could not legally extend its operative effect to property not embraced therein. The decree in this respect does not assume so to do, but follows the recitals contained

in the mortgage, as above quoted, so far as it affects this question (see decree in New York Guaranty & Indemnity Co. against the Traction Company and plaintiff, minutes, p. 3627). The subsequent conveyances by Curtis to Jenkins (minutes, p. 3604), and by Jenkins to the Reorganization Committee, consisting of Olcott and others (minutes, p. 3609), and by Olcott and others to the Brooklyn Rapid Transit Company (minutes, p. 3614), of course, did not have any effect whatever upon this claim, as it was not in fact embraced therein, and, therefore, did not pass thereunder. The status of the plaintiff, its legal title and right to enforce the demand which it now seeks to enforce, remains unimpaired.

**Effect of the mortgages executed  
by Brooklyn Rapid Transit Co. to  
Central Trust Company of New York.**

It is claimed that by the various assignments and conveyances above referred to the right, title and interest in and to the claim embraced in this action became vested in the Brooklyn Rapid Transit Company; that by mortgage, under date of October 1st, 1895, executed by the Brooklyn Rapid Transit Company to Central Trust Company of New York, as trustee, to secure an issue of \$7,000,000 of bonds issued by said corporation, the mortgagor transferred to the Trust Company all its right, title and interest in and to the claim and demand sued upon, and as such mortgage is still in force the Central Trust Company is the owner thereof, and has the legal title thereto. So far as this question is concerned, the property mortgaged is found described in the first clause of Paragraph IV of the mortgage. It was introduced in evidence by the defendant and appears at page 7197 of the minutes, and the paragraph in question is found at page 7200

of the minutes. It is not necessary to quote the language, for in all substantive respects it describes the same fund or property as is described in the Traction Company mortgage, already quoted; and the observations which have been already made upon this subject in discussing the Traction Company indenture recital apply with equal force to this. But in addition thereto, as the demand in suit was not covered by the Traction Company indenture, of course, it could not be affected by the terms and conditions of this mortgage. The recital of the property mortgaged is significant, however, in throwing light upon the intention of the parties, as to what property or demand was intended to be mortgaged, and in this respect it is perfectly clear, as it was in the former recital, that the demand which was deemed to be covered by the recital in the mortgage was the fund, if any, which should exist on the date of the expiration of the lease, or on the date of its sooner termination.

Defendant also introduced in evidence the first refunding mortgage of the Brooklyn Rapid Transit Company to Central Trust Company of New York, trustee, dated July 1, 1902, and read certain recitals therefrom, which appear in the minutes from pages 7261 to 7264, inclusive. This mortgage was issued to secure the payment of \$150,000,000 of bonds proposed to be issued from time to time by the Brooklyn Rapid Transit Company, as provided therein. It, in terms, provides for the payment and retirement of the \$7,000,000 of bonds secured by the first mortgage of the Brooklyn Rapid Transit Company, hereinabove referred to. The purposes of these mortgages were admitted by the plaintiff. That there were \$7,000,000 of bonds now outstanding under the first mortgage, and more than \$25,000,000 of bonds now outstanding under the refunding mortgage, but denied that the terms and conditions of such mortgages, or the fact of

their existence, was material to any issue presented by the case (minutes, pp. 7263 to 7264).

The recitals of the property mortgaged by the Transit Company, read in evidence by the defendant, does not affect in any degree the present question under discussion, nor does it tend to establish that the plaintiff is not the legal owner of the cause of action sued upon.

Paragraph III of this mortgage, it must be assumed, is regarded of some importance by the defendant as it makes particular reference thereto. It reads:

"III. All net profits of, or in any wise derived or receivable by The Brooklyn Heights Railroad Company, Lessee under the lease dated February 14, 1893, by The Brooklyn City Railroad Company, Lessor of all the railroads, franchises and other property thereby demised of said lessor company, and also all other income of The Brooklyn Heights Railroad Company under said lease, after discharging its obligations under the said lease."

The next clause of this paragraph relates exclusively to the guarantee fund of \$1,000,000 to be held by Central Trust Company as security for the performance of the lease with the City Company. It does not bear upon and has no relation to the question presently under discussion. The paragraph further provides:

"Also all the net profits and all other net income derived or receivable by the Transit Company from The Brooklyn Heights Railroad Company under or by virtue of any lease or contract with any and all other corporations with which leases or contracts now exist or may be hereafter made by The Brooklyn Heights Railroad Company."

It will be noticed that in the clause first above noted the profits referred to are the net profits derived or receivable under the lease, and also all

other income of the Brooklyn Heights R. R. Co. under said lease "*after discharging its obligations under the said lease.*"

It has never been claimed, so far as we are aware, that the claim and demand sued upon represented in any sense profits derived under the terms of the lease by the Brooklyn Heights R. R. Co. This claim is in no sense profits derived from the lease. It consists of money which had been paid by the Heights Company which the defendant was obligated to pay, and which it failed in so doing. Such sum, therefore, is not a profit derived or receivable under the lease, much less a net profit which is the thing mortgaged. There is no evidence to show that the Heights Company derived any such profits in any form, unless it be embraced within the enhanced value of the lease. It is absurd to say that the claim here made for the moneys advanced pursuant to the provisions of the lease, and the interpretation thereof by the parties, can be described in any sense as a profit. Neither is the claim income which might be received by the Heights Company after discharging its obligations under the lease. This demand is not income any more than it is profit, in consequence of which it cannot be said to be embraced within the property mortgaged under this recital. And the same observation is equally and directly applicable to the last above quoted clause of this recital. Manifestly the claim here sued upon is not embraced within this language.

There is another clause in this mortgage which sheds light upon the whole situation and the intention of the parties. It is found in the 4th clause, and so far as material, reads:

"IV. All the right, title and interest heretofore acquired and now owned, or hereafter acquired with the proceeds of bonds issued hereunder, by the Transit Company in and to



the amount of the cost of all property, extensions, branches, additions, improvements and equipments heretofore or hereafter acquired for use in connection with the operation of the railroads of The Brooklyn Heights Railroad Company."

It then recites a number of other railroad companies not necessary to mention, and continues:

"Subject to the terms of leases or contracts heretofore or hereafter made, between any two or more of said corporations, or between any one or more of said corporations, and any other corporation, or for use in connection with the operation of the railroads of any other corporation, stock of which may be owned now or hereafter by the Transit Company."

This clause only mortgages such property as may be then owned or afterwards acquired with the proceeds of bonds issued under the mortgage, but in terms it makes the property mortgaged thereunder subject to leases and subject to the lease between the Heights Company and the City Company as it is embraced within the description. Consequently whatever rights and liabilities were created by the terms of that lease and existing between the City Company and the Heights Company such provisions were required to be observed even under this clause and would not pass under the mortgage. As we have already seen, among the things reserved in that lease was the appropriation for the cost of conversion, extensions, additions, betterments, etc., to be paid for by the issue of stock and bonds and other property, and no expenditure of money could be made by the Heights Company save by temporary advances from its funds until the application of the entire sum, which the City Company was obligated to furnish, was made and expended. The stretch of imagination cannot be wide enough to embrace within the language of this mortgage the claim and demand which

forms the basis of this action. On the contrary, as it was subject to the terms and conditions of the lease between the parties it was expressly excluded therefrom, as this mortgage is made subject to such obligations, rights and liabilities.

**Effect of the agreement, dated March 24, 1896, between the Brooklyn Rapid Transit Co. and the Brooklyn Heights Railroad Co. adjusting certain accounts.**

The plaintiff introduced in evidence an agreement made and executed on the 24th day of March, 1896, between the Brooklyn Rapid Transit Company and the Brooklyn Heights R. R. Co. This agreement is set out *in extenso* in the minutes and appears at pages 7268 to 7274, inclusive. We assume that this agreement and other documentary evidence *in pari materia* therewith, is relied upon by the defendant to show that the ownership of the claim and demand now sued upon resides in the Brooklyn Rapid Transit Company, or in the trustee of the mortgages executed by it.

We believe that a careful consideration of this agreement, and the other items of evidence in connection therewith, not only refute the claim of the defendant in this respect but shows conclusively that the legal title to the claim and demand rests in the plaintiff. The agreement is one of settlement and adjustment of accounts between two corporations. After reciting a specific indebtedness of \$350,000 due from the Heights Company to the Transit Company, which appears in the first preamble of the agreement, and after reciting certain other obligations represented by promissory notes and otherwise, and of the equities existing between the Long Island Traction Company and the Heights Company which is proportioned between the two as between them

and the Transit Company, and without stating any exact amounts which will specifically represent the amounts of the indebtedness and equity, it proceeds to adjust the same by agreement upon an arbitrary basis in this language:

"NOW, THEREFORE, for the purpose of avoiding any future controversies and disputes, and of finally adjusting and compromising all claims and demands of the Transit Company against the Heights Company, it is agreed by and between the parties hereto as follows:

1. The Heights Company will pay to the Transit Company interest semi-annually at the rate of five per cent. (5%) per annum upon such total amount of said obligations as is estimated to have been expended for construction and betterments, which amount is hereby fixed and agreed upon as being the sum of \$2,237,897.35 on January 1, 1896, said interest to be paid until the termination of the lease by the Brooklyn City Railroad Company of its railroad system to the Brooklyn Heights Railroad Company, which lease bears date of February 14, 1893; and the Transit Company releases the Heights Company from any obligation to pay any part of such principal amount, and accepts such agreement to pay interest in full satisfaction of all its claims and demands by reason of the transactions hereinabove set forth."

The amount of the indebtedness of the Heights Company, as expressed in this paragraph of the agreement, excludes the sum which had been advanced by the Heights Company for the conversion of the railroads to an electrical system, and represents the particular sum for which a recovery is asked for in this action.

Paragraph 2 of this agreement provides for the expenditures of such amounts as may be hereafter advanced by the Transit Company and makes specific provisions for the expenditure of such moneys,

and provides that such sums shall be expended by the joint committee therein provided for which "shall be proper charges therefor on the books of the Heights Company against the Brooklyn City R. R. Co. shall not be repaid by the Heights Company to the Transit Company but the Heights Company shall pay interest thereon semi-annually at the rate of five per cent. (5%) per annum until the termination of said lease from the Brooklyn City R. R. Co. to the Heights Company, and the Heights Company will repay the principal of all other moneys which may be advanced by the Transit Company to the Heights Company, or paid and expended by the Transit Company for the Heights Company under the supervision of such committee, with interest thereon semi-annually at the rate of 5% per annum."

The further provision in the 2d Clause relates to an item not important in this controversy but is important in the fact that as to such item it provides that the amount is evidenced by a note held by the Transit Company against the Heights Company.

The 4th Clause of the agreement provides for a specific sum of \$235,000 made by the Reorganization Committee of the Traction Company to the Heights Company for which a note was given by the latter company to the Committee, and by them transferred to the Transit Company, who is now the owner. The amount of this note is recited as having been expended for betterments and improvements by the Heights Company and it is agreed that the note should be cancelled and in lieu thereof the Heights Company should pay interest semi-annually at the rate of 5% until the termination of the lease.

Clause 5 is in the following language:

"5. The Heights Company shall continue to keep an accurate account of all expenditures for betterments and construction which

are a proper charge against its lessor, the Brooklyn City R. R. Co., and to give access to the same at all reasonable times to the said Transit Company, or its properly accredited officers or agents and shall also by proper entry on its books of account recognize the ownership of the Transit Company in said construction account, so that in the event of any termination of said lease the amount of such claim against the Brooklyn City R. R. Co. shall correctly appear and be readily ascertainable; and the equitable interest of the Transit Company therein shall appear upon the books of the Heights Company."

The 6th Paragraph provides for the execution and delivery of promissory notes by the Heights Company to the Transit Company for the amounts agreed to be paid by the Heights Company to the Transit Company.

The 7th and last Clause provides:

"7. The Transit Company, which by virtue of the foreclosure proceeding described above, became possessed of all right, title and interest of the Traction Company and the Heights Company in the guarantee fund created and established in pursuance of the terms of the lease between the Heights Company and the Brooklyn City R. R. Co. agrees to pay over to the Heights Company \$187,500 out of each year's income thereof, such \$187,500 of each year's income of said fund being hereby assigned and transferred by the Transit Company to the Heights Company, the right, title and interest of the Transit Company in and to the balance of said income and the whole of the principal of such fund being retained by the Transit Company."

It is perfectly apparent by this agreement what the parties sought to accomplish, and their language can admit of but one construction. Generally it provided for such sums as should be an indebtedness in favor of the Transit Company as

against the Heights Company, some of which indebtedness was never to be discharged, save at the expiration of the lease, and then without payment. The other provisions relate to an existing indebtedness which the Heights Company was to discharge by its promissory notes to be thereafter paid, and as to the guarantee fund the particular rights of each party were ascertained therein and the amount due to the Heights Company was to be paid over to it.

So far as Clause I is concerned, which relates to the \$2,237,897.35, the relation established between the Transit Company and the Heights Company is clear. This was considered an indebtedness of the Heights Company upon which it was to pay interest at 5% during the duration of the lease. Such arrangement excludes the theory that title to the sum of money passed to the Transit Company thereunder. On the contrary, its plain provision is that it was a debt of the Heights Company to the Transit Company upon which it should pay interest, and there is not a syllable in the whole clause, or earlier or later in the agreement, which evidences any intention whatever to pass the title to that fund to the Transit Company. This related to a present existing condition as between the Heights Company and the Transit Company, and was adjudged accordingly. It did not take into consideration any relation whatever which existed between the Heights Company and the Brooklyn City R. R. Co. Whatever were the rights and liabilities under the lease as between those two companies remained unaffected by anything said in this instrument. The Transit Company had advanced the money to the Heights Company, and the Heights Company had expended such money for purposes to which the Brooklyn City R. R. Co. should have applied the proceeds of stock and bonds and other property. It had failed in the ful-



fillment of the obligation in this respect, and this agreement simply adjudged the accounts between the Heights Company and the Transit Company and left the obligation of debt intact as between the Heights Company and the Brooklyn City Company. It remained with the Heights Company, therefore, to enforce such obligation and it had title thereto to enable it to legally enforce its rights, and no interest or right which the Transit Company had in or to this fund affected such legal title or right to invoke legal remedies to enforce the same. That remained with the Heights Company.

It referred also to an existing condition which was fixed and settled. By Clause 5 of the agreement wherein provision was made for future contingencies which required of the Heights Company that it should keep an accurate account of all future expenditures for betterments and construction which should be its proper charge against the City Company. The Transit Company was to have access to its books and its *ownership*, in the event of any termination of the lease, should correctly appear and be readily ascertainable. The use of the word "ownership" here is clearly a misuse of the term. What would accurately have expressed the idea would have been the use of the word "interest," because it is perfectly clear from the whole body of the agreement what the precise intention of the parties was. The Rapid Transit Company was advancing moneys to the Brooklyn Heights Company for which it would be entitled to credit as against the Heights Company. The latter was engaged in carrying out the terms and provisions of the lease with the Brooklyn City R. R. Co. With the latter company the Transit Company had neither contract nor contract relations, either by lease or otherwise, so far as it affected this transaction.

As the dealings between the Heights Company and the Brooklyn City Railroad Co. were measured and determined by the obligations of the lease, the Heights Company was left in relation thereto, as though there had been no intervention with it of any party. It stood in the attitude of a simple borrower to the Transit Company under fixed terms and conditions.

It was not of the slightest consequence or interest to the Brooklyn City Co. where the Heights Company obtained its money, or how it fulfilled its obligations, save as they were measured by the terms of the lease, and the City Company was in no wise relieved from any obligation which it had assumed by virtue of the lease, and it continued to be obligated to furnish the moneys as therein provided.

When the Heights Company advanced moneys necessary for construction, which the City Company was to repay, that became a contract and obligation existing between the Heights Company and the City Company, upon which the agreement between the Heights Company and the Transit Company had no effect. It did not assume to change the lease or the obligation of the parties. The intent was to permit the lease to remain in full force and vigor and to leave the Heights Company to deal with the City Company upon precisely the same terms, as though the Transit Company had never been organized. How, under the circumstances, it can be urged that the effect of this agreement was to transfer the legal title to the claim or demand sued upon in this action, passes the bounds of comprehension, let alone of reason.

The subsequent accounts of the parties clearly evidenced that this agreement, so far as it related to the \$2,237,897.35, was regarded by both of the parties thereto as creating in the Transit Company an equitable interest in the fund and that alone.

It had no other at any time and did not acquire any greater interest by reason of the agreement. That left the legal title to this claim and demand in the Brooklyn Heights Company.

After the making of this agreement and under date of April 20, 1896, an entry sheet was inserted in the sundry ledgers account, book 13, showing the method by which the amount provided for in the agreement was reached. This entry sheet was introduced in evidence by the defendant, and appears at pages 7275 to 7278, inclusive. There was attached to this entry sheet an explanation signed by Mr. Collin, counsel, Mr. Meneely, auditor and Mr. Barnaby, chief accountant. The clause relating to this item, reads:

“By virtue of an agreement, dated March 24, 1896, between the Brooklyn Rapid Transit Company and the Brooklyn Heights Railroad Company adjusting all future claims between said companies, the Brooklyn Rapid Transit Company is credited under date of January 1, 1896, with \$2,237,897.35, which, under the above agreement is the sum fixed and agreed upon as the total amount of the construction and betterment account of the Brooklyn Heights Railroad Company against the Brooklyn City Railroad Company, at the above named date.”

This did not add anything to nor take anything away from the force of the agreement. It was the basis for this statement. The Brooklyn Heights Company was entitled to such credit as owner of the claim and demand against the Brooklyn City Railroad Co., and the legal title to such claim in it remained unaffected by any statement contained therein. On the contrary, the statement but confirms the effect of the agreement and shows the understanding of the parties. Upon this sum thus credited to the Brooklyn Heights Railroad Co. it was to pay interest to the Transit Company, and

that established the relation of debtor and creditor. This entry does not assume to affect it.

Under date of January 1, 1896, appears an entry in the Brooklyn Rapid Transit books of an account, headed: "Brooklyn City Railroad Construction Account," which was introduced by the defendant in connection with Fosdick's testimony, which appears at page 7385.

I do not propose to discuss in this point the evidence respecting the accounts between the two companies. That will appear in another point and reference is made to such discussion of the details thereof.

It appears in an account headed: "Brooklyn Rapid Transit—equity Brooklyn City Constn. Ac." an item, under date of January 1, 1896, of \$2,237,897.35, together with other items, amounting in the aggregate to \$4,000,000 and over. This is the item of the account stated and adjusted in Paragraph 1 of the agreement, and while the date precedes the date of that agreement it is evident that the settlement of the account adjusted was of a time considerably prior thereto, and the equity which the Brooklyn Rapid Transit Company had in the account was the equity which was recognized in the agreement, which, for a long time prior thereto, had undoubtedly been understood and agreed upon. Such entry not only conforms to the terms of the agreement, but states what the parties understood with respect thereto during the whole period of time when the obligations were being incurred by the Brooklyn City Company in favor of the Heights Company, and before the intention and understanding of the parties was expressed in the written agreement.

It is evident, therefore, that neither in the books of account nor in the agreement itself nor in any other paper or document is there ground for making the claim that the defendant has not been at

all times the holder of the legal title to this claim. Indeed, if the statements in the books tended to a contradiction of the written agreement as to the status of this account, the agreement would control, as mere bookkeeping entries cannot operate to change an existing engagement of parties evidenced by a written contract, especially where no other rights intervene than such as exist between the parties to the written instrument. In addition to this and under date of July 19th, 1898, which was before the commencement of this action, the Board of Directors of the Brooklyn Rapid Transit Company adopted the following resolutions:

“Resolved, that in pursuance with the recommendation of the Finance Committee and the officers, the officers be authorized to make such modification of the contract between the Brooklyn Rapid Transit Co. and the Brooklyn Heights R. R. Co. as will allow the Brooklyn Rapid Transit Co. to retain the interest on the guarantee fund in consideration of the Brooklyn Heights Co. being released from the payment of interest on the Brooklyn Rapid Transit Co.’s equity in the Brooklyn City Co.’s construction account, said modification dating from July 1, 1898.”

This resolution related to and modified the provisions of Paragraph VI of the agreement of March 24th, 1896, and absolved the Transit Company from the obligation to pay over \$187,500 of income out of the guarantee fund and in consideration thereof relieved the Heights Company from the obligation to pay 5% upon the \$2,237,897.35, as provided for in Paragraph I of said agreement. This resolution was met by a corresponding resolution of the Heights Company and the agreement thus became modified. It is clear, therefore, from these resolutions and their subsequent fulfillment by the parties, that the Transit Company ceased to have even an equity in the Heights’ demand and claim

against the defendant, which is made the subject of this action. After this arrangement the Transit Company had no more interest in the present claim than did any other stranger.

The defendant also introduced in evidence certain balance sheets reporting to the Board of R. R. Commissioners summary report for 1899, in which the statement is made in varying forms "Brooklyn Rapid Transit Company's equity in Brooklyn City R. R. Construction, payable by Brooklyn City R. R. Co." at the termination of the lease. These reports are found in the minutes, pages 7201 to 7206. As to these items they explain themselves fully and completely and are in perfect harmony with the relation which was established by the agreement above adverted to.

Similar statements are contained in extracts from reports made to the New York Stock Exchange by the Brooklyn Rapid Transit. They set out in like manner the equity in the Brooklyn City R. R. Co. construction fund account, and are substantially similar to the reports to the Railroad Commissioners and such as are contained in the balance sheets. They state the exact facts. The Brooklyn Rapid Transit Company did have an equity, but it was not the owner of the legal title and never has been.

In one of the reports, appearing on page 7246, is a statement of absolute ownership by the Transit Company of all the stock of the Brooklyn Heights R. R. Co., followed by the language:

"The ownership of all the stock of the Heights Company amounts of course to the ownership of assets of the company which consists as follows:"

This might be a statement of what the parties thought who drew that report, but it is well settled that stock ownership does not carry with it title to



corporate property. Such corporate property belongs to the corporation, is to be protected by it and right therein and thereto can only be enforced through it. The stockholder does not own such property, nor can it enforce any right with respect thereto, save in behalf of the corporation. All stockholder's suits which have for their object, the assertion of such rights existing in the corporation are entirely derivative and can only be enforced at the instance of the stockholder when the corporation refuses to act, but so long as there is in existence a corporate entity the legal title to all of the property is owned by it and the stockholders are not admitted in any sense to a share in such legal ownership by reason of ownership of stock. The stock may give control of the corporation and dictate its action with respect to property, but it does not transfer or vest the holder thereof with the legal or equitable title.

*Morawetz on Private Corporations* (2d Edition), Sec. 233.

*People vs. American Bell Telephone Co.*, 117 N. Y., 241-255.

*Buffalo L. T. & S. D. Co. vs. Medina Gas Co.*, 162 N. Y., 67-76.

But immediately following such declaration it appears (minutes, page 7247) that the property of which it is asserted to be the owner is an equity in the construction fund account of the Brooklyn Heights Railroad Company against the Brooklyn City Railroad Company amounting then to \$2,647,-328.72.

The evidence which supports this claim of the lack of ownership in the plaintiff of the demand sued upon will not commend itself to this Court. If the Brooklyn City R. R. Co. has failed to apply the whole of the proceeds of the stock and bonds and the other property, as provided for in the lease,

then it is clear that it owes to somebody the sums of money which it has received from such sources and failed to apply. It would be most unconscionable to permit the defendant, if it be justly indebted in the amount complained of in the complaint, or such other sum, to escape liability upon any such plea as lack of ownership in the corporation seeking to enforce it. It is clear beyond dispute that the plaintiff has advanced the sums of money to an amount which it seeks to recover back. The only just answer which the defendant can make to such claim is that it has paid or applied such sums to the purposes for which the lease provided. If it fails in that then it should be compelled to respond by a judgment which shall compel it to observe the obligations which it assumed under the terms and conditions of the lease. It protected itself by precise, even drastic, terms and conditions at every point, and it is justly held responsible for failure to fulfill its obligations to the other party thereto. If the plaintiff in this action be not permitted to recover then the defendant goes scot free from any liability, as the Statute of Limitations will effectually shelter it from any demand by any party. It seems to be clear that the Brooklyn Rapid Transit Co. and the plaintiff have attempted, by precise and particular provision, as has been above shown, to adjust their relation in respect to this sum of money which would leave the legal title thereto in the plaintiff. In addition thereto the Brooklyn Rapid Transit has, by resolution under date of September 9, 1908, disclaimed any interest in or to the moneys, the subject of this action, and has caused the same to be adopted by its Board of Directors (see pp. 7477-81).

As we have seen that the trustees, under the respective mortgages, took no title to the moneys which the defendant obligated itself to pay, there

can be no question of any right or interest in any trustee for the protection of the stockholders or otherwise arising out of such situation. The action of the Brooklyn Rapid Transit Company through its resolution would clearly operate as an estoppel against it of ever asserting in any manner any liability on the part of the defendant to it for the moneys which are sought to be recovered in this action.

*Isham vs. Buckingham*, 49 N. Y., 216.

*Kernan vs. The Mayor*, 79 N. Y., 511.

So that when the whole case is examined this controversy, it is seen, both at law and in equity, comes to rest between the plaintiff, on the one side, and the defendant on the other, and the determination of this action, so far as this fund is concerned, will settle the rights and liabilities of the respective parties in respect thereto in which no other person can or will have any interest.

It is therefore submitted that this defense is utterly destitute of merit, either in law, in equity or in fact, and should not be permitted to prevail.

**Tabulations made by defendant's expert accountant do not in any way affect plaintiff's proof as to its right to recover, nor as to the amount of such recovery.**

Defendant employed an expert accountant who prepared various statements, all admittedly compiled from books of the defendant, and all of those books of account are in evidence. A brief discussion of these tabulations will show conclusively that while the figures contained therein may be found in defendant's books of account, the tabulations made by defendant's accountant are not only made up on a different theory from any theretofore advanced by the defendant with respect to its expenditures out of the construction funds, but also upon theories inconsistent with the provisions of the lease. These tabulations will be taken up in order.

### **Defendant's Exhibit 1457.**

This is supposed to be a statement of the assets and liabilities of the defendant on February 14, 1893. On page 1 of this exhibit, under the head of "Liabilities" are shown unissued bonds \$3,000,000  
Unissued capital stock, 3,000,000

Forsdick admitted that these figures did not appear on the defendant's book of account on February 14, and admitted that they appeared only in the resolutions of the stockholders and directors authorizing the creation of the \$6,000,000 mortgage and authorizing the increase of the capital stock.

Forsdick also admitted (p. 7317) that his calculation of the surplus on pages 1 and 2, contained no reference to operating liabilities accrued on Feb-

ruary 14th, nor to interest and taxes accrued and unpaid on that date. It also appears that from the statement of assets is omitted accounts receivable accrued on February 14th. This summary on Exhibit 1457 is therefore nothing more than a copy of items selected from the defendant's books, and not a true copy because it includes the \$6,000,000 stock and bonds taken (as of February 14), disregarding wholly accrued operating liabilities which the proof showed aggregated \$157,853.60 (p. 7489). The statement of assets did not include a large amount of items receivable, some of which are described in detail at pages 2368-77. The third page of Exhibit 1457 is headed "Statement of disbursements for account of conversion and construction, and charges of conversion and construction accounts, and sources from which made February 14, 1893, to July 1, 1895."

The table of disbursements admittedly includes disbursements on account of construction obligations owed by the defendant on February 14, which under Article "IV" of the lease, the defendant was under obligation to pay out of its own funds as distinguished from the \$6,000,000 fund. It also includes all the journal entry charges amounting to \$721,198.33, and also includes and omits certain items in the bills of particulars as will be seen in the discussion of Defendant's Exhibit 1467.

Page 4 of this exhibit is headed "Sources from which made." The first entry is obviously a fiction in that it lists the \$3,000,000 of bonds and \$3,000,000 of stock as "securities on hand." As is shown in another part of the brief, the defendant claims the stock and bonds were on hand on June 6, 1893, under Article IV of the lease, a claim which, if sustained, will make the indebtedness of the defendant to the plaintiff much greater than plaintiff claims.

The second part of this sheet 4 is devoted to "excess of monies, credits and securities on hand over surplus February 14, 1893." This statement puts into the asset account supplies at the book value, when the proof shows that a large part of these supplies had disappeared from the assets of the Company long before. The sheet then deducts as surplus \$769,792.79, which is the apparent book surplus, without deducting accrued operating expenses, taxes and interest. This method of accounting also ignores dividends paid out of this same surplus on March 31, 1893, and June 30, 1893. These dividends amounted to \$320,000, and were much in excess of the net earnings of the defendant from February 14 to June 30 (p. 7147). On this sheet the defendant lists also under the head of "Sales of real estate," two items of \$15,500 and \$111,013.63. *These two items never appeared in any other statement of account in reference to this conversion fund heretofore made by the defendant.* They are justly an addition to the conversion fund, but in fact the item should be very much larger than is shown on this exhibit. The history of these two items is as follows:

After February 14, 1893, and before June 6, 1893, the defendant sold two parcels of real estate, viz.: a parcel on High Street and a parcel on Sands Street. The former was sold for \$150,000 on March 24, 1893, as is admitted by defendant (p. 2133). In August, 1894, the defendant received interest on its purchase price \$10,458.26, and the principal of \$150,000. Instead of applying this total of \$160,458.26 to construction purposes, in accordance with the provision of the lease, the defendant credited to real estate \$111,013.63, which is the only part of this total accounted for on Exhibit 1457, and credited to its surplus the balance of this real estate sale and interest amounting to \$49,444.63. This



was done, according to the claim of the defendant (pp. 7322-3), because the property had originally cost \$111,613.63 and \$38,986.37 was the profit on the transaction. In other words, notwithstanding the fact that the defendant leased and demised all its real estate to the plaintiff, and in the lease contracted that unused real estate might be sold, and the proceeds applied to construction purposes, by this entry it claims the right to give to its stockholders the difference between the ancient purchase price of real estate and the selling price. Apparently if they sold for \$100,000 at the present time, real estate which cost them \$4,000 or \$5,000 in 1860, they would seek to give their stockholders the difference as profits, notwithstanding the plain provisions of the lease. The other item of \$15,500 is part of the selling price of a parcel of property on High Street on April 14, 1893. Of \$16,500 of this amount, the defendant credited \$15,500 to real estate as appears on Exhibit 1457, and credited \$1,000 to rents of real estate. This item is in the same category as the Sands Street property, and the defendant should account for the entire purchase price of \$16,500 as a part of its conversion fund. On this schedule, the defendant admits that the note of \$308,340.35 was given by the Heights, and subsequently paid by it, and was an addition to the construction fund.

The next sheet of Exhibit 1457 purports to be a statement of the assets and liabilities of the defendant on July 1, 1895. From this schedule it appears that it claimed on July 1, 1895, to have on hand a surplus of \$702,501, notwithstanding the fact that it only claimed a surplus of \$760,792.79 on February 14th, and that subsequent to February 14th, it paid its stockholders dividends of \$840,000 in excess of rents received from the plaintiff. Exhibit 1457 should therefore be corrected in the

following particulars, in order to show the result, if February 14 is the date of cut-off:

From the disbursements on sheet 3 of that exhibit,	\$7,017,430.16
<hr/>	
Should be deducted (see Exhibit 1458) an item of	\$8,000.00
Journal entries,	721,198.33
<hr/>	
	\$729,198.33
<hr/>	
Leaving its actual disbursements	6,289,231.83
<hr/>	
Sheet 4 should be modified by adding to assets,	\$7,017,430.16
Premium actually received on bonds,	221,903.50
Balance of High Street property re- ceipts,	1,000.00
Balance of Sands Street property re- ceipts,	38,986.37
Interest received from Heights on \$308,000 note	16,136.46
<hr/>	
Total	\$9,170,456.49
<hr/>	
Amount unexpended,	\$1,006,224.66

The discussion of Defendant's Exhibit 1467 (brief, p. ) shows that 1457 does not pretend to coincide with Defendant's Bill of Particulars.

### **Exhibit 1458.**

This purports to be a statement of the defendant's surplus account, by which it brought a book balance of \$760,792.79, as shown in Exhibit 1457 down to a credit balance of \$702,501 on July 1, 1895. An examination of the schedules attached to that exhibit shows the following:

On Schedule 1, defendant has included the transfer from passenger earnings to operation of \$24,000

by journal entries heretofore shown to be a fictitious total.

It has transferred on Schedule 2, \$137,797.03 under journal entries heretofore shown to be fictitious. It has included Schedule 4, premium

on bonds sold,	\$221,903.50
Premium on capital stock sold,	9,886.10

As heretofore shown, if the \$6,000,000 of bonds and stock were moneys, credits and securities on hand either June 6 or February 14, it was the duty of the plaintiff to obtain a reasonable market price for the same, and out of the resultant fund to pay its accrued liabilities, its surplus, and turn the balance over to a conversion fund. No provision of the lease and no consideration of good business policy or dealings, either with the plaintiff or with the public, can justify a distribution among its stockholders by the plaintiff of premiums on bonds and premiums on stock as earnings.

In Schedule 5, it has included (p. 7322) the alleged profit on the Sands Street property which under the lease, should have gone into conversion funds, also on the interest on Sands Street property and interest on deposits. These items are included notwithstanding the fact that the defendant by its journal entries has attempted to charge plaintiff with all interest paid by the plaintiff from July, 1892. On page 6 the defendant assumes to include in its surplus \$41,655.41, which it charged to the plaintiff, and which the plaintiff paid on the note of \$308,340.35 heretofore discussed.

It also included in its surplus interest paid by the plaintiff on that note, of \$16,546.16; also \$27,619.67 interest transferred by journal entry on interest account to construction, notwithstanding such payments were made before the lease was thought of; also interest to the amount of \$20,644.14. It has also included in its surplus on Schedule 6 the \$90,000 entry, by which it charged

to construction, and therefore to the plaintiff, part of its dividend paid before the lease was conceived. It has reduced its alleged surplus, Schedule 9, by an item of \$11,474.40. It attempted by its journal entry of February and March, 1894, to force a balance in supply account by charging to construction and crediting to supplies, three items aggregating \$335,964.33 as heretofore shown. It discovered in June, 1895, that this forced balance did not in fact balance the capital account, but left the capital account over-credited \$11,474.40, and by its entry of June, 1895, it attempted to rectify to that extent the forced balance theretofore made.

The total of the amounts thus erroneously added to surplus is \$639,496.64, so that the surplus shown on Exhibit 1458 as of July 1, 1895, should be reduced by that amount, or to \$63,004.36.

#### **Defendant's Exhibit 1462.**

This is a restatement of Schedule E of defendant's bill of particulars, excluding from such schedule the two small vouchers on page 1 of that schedule \$4,102.48 and \$1,891.40; excluding also the charge of \$41,655.41, interest paid by plaintiff, excluding also the last two items of Schedule E amounting to \$25,548.11. This schedule is concededly a correct statement of advances made directly.

#### **Defendant's Exhibit 1465.**

This is a statement of the total operating charges of the defendant during the year commencing July 1st, 1892, also of the journal entries transferring part of these operating expenses to construction, and attempting thereby to increase the surplus of the defendant by \$137,797.03, so as to deduct that amount from the available conversion funds. The items in this schedule have been heretofore sufficiently exposed.

**Exhibit 1466.**

This is a restatement of a part of Exhibit 1457, except that it divides the items found in 1457, page 300, under "Head of Departments" into two schedules, the first of which purports to cover the direct payments by the defendant; and the second to cover its advances to the plaintiff, but the sum of these two on Schedule 1466 is the same as the total on 1457 of the alleged disbursements.

**Exhibit 1468.**

This is an account of its alleged expenditures after February 14th for conversion and construction. This schedule includes part of Schedule 4 of Exhibit 1457, but is said not to include the journal entries. In fact it does include \$29,105.27 of interest transferred by journal entries, \$80,000 transferred from supplies for generators, and the so-called interest of \$41,655.41 on the yellow sheet. This exhibit professedly includes construction obligations outstanding February 14th amounting to \$194,345.99. This exhibit makes no account of the construction funds applicable on or after February 14th.

**Exhibit 1470.**

This is a labored attempt to prove from the *plaintiff's* ~~defendant's~~ books that the account on ~~defendant's~~ *plaintiff's* books headed "Brooklyn Rapid Transit Co. Equity Brooklyn City Construction account," \$2,237,987.35, is identical in source with the total construction expenditures up to January 1st, 1896, by the plaintiff.

It is assumed that the object of defendant in interposing this complicated account admittedly made up of the items selected here and there from the plaintiff's books without taking all of the items in any particular account, was introduced in the

attempt to prove that the plaintiff does not own the cause of action sued upon. This contention of defendant is treated at length in another subdivision of this brief, and it is sufficient to say of this exhibit, that even if the "Brooklyn Rapid Transit Company equity account" is proven to be identical in kind and in source with the "Brooklyn City Construction account" on the plaintiff's books, such proof does not even tend to affect the ownership by plaintiff of the claim upon which suit is brought in this action.

It proves only that plaintiff owed money to Brooklyn Rapid Transit Company, which plaintiff had expended on defendant's road; and expected to pay Brooklyn Rapid Transit Company such debt, when able to collect from defendant.

*If the debt of the defendant had been owned by Brooklyn Rapid Transit Company, the entire account would have been balanced and taken off plaintiff's books, as plaintiff could have had no further concern with it.*

### **Defendant's Exhibit 1467.**

This is an attempt to explain the difference between 1457 and the defendant's bill of particulars. Admittedly the defendant is bound by its bill of particulars unless it moves to amend. This exhibit, however, is interesting as showing that the defendant now concedes (see deductions on p. 1 of this exhibit) that its charge of \$350,000 shown on Schedule F of its bill of particulars was not a payment by it for construction purposes. This exhibit also shows that the last two items of Exhibit E of its bill of particulars amounting to \$25,548.11 were erroneously included in its bill of particulars. Also that the correcting entry on Exhibit A of its bill of particulars, \$3,000, should be taken out. This sheet also shows that on the bill of particulars the



defendant did not give the plaintiff credit for operating expenditures of defendant paid by plaintiff amounting to \$41,349.95. Plaintiff's proof shows that this amount should have been \$42,532.84 (see p. 392 of evidence). The first page of this Exhibit 1467 shows that in Exhibit 1457, there has been included a lot of items aggregating \$24,236.81, which were not in the bill of particulars, or if in the bill of particulars, were not in 1457. The first item of \$8,000 is explained by Forsdick (pp. 7309, 7325) as being in 1457, while it was not in the bill of particulars after February 14th, because while the voucher was issued on February 9th, the cash account of the defendant shows that it was not paid until after February 14th.

The next three items which admittedly (see Forsdick's evidence, pp. 7325-8) were operation items, but appeared on the books of the defendant erroneously as construction items, have been included by it in 1457. The next item on 1467 of \$10,000 is a cross entry made in 1895 in connection with the Grand View Hotel property (see Forsdick's evidence, p. 7310). It appears from defendant's journal No. 2 (p. 279), under date of November 2, 1891, that the Grand View Hotel property was sold for cash, \$10,000, mortgage \$70,000, total \$80,000. That this property had cost as follows:

Land,	\$22,441.60
Hotel and furniture,	122,357.00
Pavilion,	3,022.00
	<hr/>
	\$147,820.60
That the value of land not sold was	
worth,	\$12,000.00
	<hr/>
Cost of property sold,	\$135,820.60

This amount was charged off on that date as follows:

Accounts receivable,	\$70,000.00
Surplus and deficiency for loss on above property,	55,820.60
Cash,	10,000.00
Total,	<hr/> \$135,820.60

On October 1, 1892, a payment of \$10,000 was made on this mortgage, and the amount was credited to real estate, when it should have been credited to accounts receivable because the asset had been transferred from real estate to accounts receivable. This entry was corrected by the entry of February 28, 1894, but the amount is carried on Exhibit 1457 as accounts receivable \$70,000, when the accounts receivable should have been \$60,000, and real estate accounts should have been \$10,000 greater than appeared on February 14. This correction of defendant's bookkeeping had no actual relation to its disbursements on account of the conversion fund and could not be charged to plaintiff.

The next eight items on Exhibit 1467 are made up of miscellaneous receipts which appeared on defendant's bill of particulars, but are not credited to construction on Exhibit 1457.

By an inspection of defendant's journal, referred to on Exhibit 1457, it appears that these items are actual refunds of similar amounts theretofore paid out on account of construction. They correctly appear on the bill of particulars and Exhibit 1457 is not correct in not showing these credits.

The last items on 1467, \$2,302.50, appears by reference to their journal to be made up of items received on account of insurance on Grand View Hotel. The hotel property was burned in January, 1893, and the receipts from the insurance actually went to reduce the outstanding mortgage on the property which was owned by the defendant, and which appeared in 1457 as an asset from which construction disbursements were made.

**IX.**

**The plaintiff is entitled to judgment for \$1,740,258.38 with interest at 6 per cent. per annum from September 1, 1894.**

GEORGE D. YEOMANS,  
Plaintiff's Attorney.

Counsel:

CHARLES A. COLLIN,  
JOHN L. WELLS,  
EDWARD W. HATCH,  
C. A. SEVERANCE.

### **Appendix A.**

THE DIRECTORS OF A CORPORATION IN LAW STAND IN THE RELATION OF TRUSTEES TO SUCH CORPORATION, AND IF THEIR PERSONAL INTERESTS CONFLICT WITH THEIR DUTY AS DIRECTORS, THEIR TRANSACTIONS AND CONTRACTS ARE VOIDABLE AT THE ELECTION OF THE CORPORATION. The rule embraces every relation in which there may arise a conflict between the duty the director owes to the corporation and his own personal interest. It applies equally whether the directors cause the corporation to enter into contracts with themselves personally, or with other corporations in which such directors are interested as shareholders.

Although this doctrine is declared with practical unanimity by the courts of America and England, in no jurisdiction is it more rigidly applied than in New York.

We have shown in our printed argument that practically every director of the plaintiff who voted in favor of the execution of the tripartite agreement so-called, was largely interested in the securities of the defendant, and hence disqualified to act for the plaintiff.

We have also shown that although the Long Island Traction Company was the nominal holder of all the stock of the plaintiff, and joined in the said agreement, nevertheless its directors who caused the execution of the agreement by the Long Island Traction Company, are the same individuals who were at the time directors of the plaintiff and stockholders of the defendant and disqualified, as we have shown. The evidence discloses that the stockholders of the Long Island Traction Company did not authorize the execution of the tripartite agreement. It further appears that the stock of that Company

was largely scattered and largely dealt in on the market. Under these circumstances, the tripartite agreement being affirmatively set up and relied upon by the defendant, the plaintiff is not bound by the same.

- Continental Insurance Co. vs. N. Y. Cen.  
& H. R. R. Co., 187 N. Y., 225.
- Barr vs. Railway Co., 125 N. Y., 263.
- Farmers' Loan & Trust Co. vs. N. Y. &  
Northern Ry. Co., 150 N. Y., 410.
- Niles vs. N. Y. Central & Hudson R. R.  
Co., 176 N. Y., 119.
- Coleman vs. Second Avenue Railroad Co.,  
38 N. Y., 201.
- Same vs. Same, 41 N. Y. Sup., 566.
- Flynn vs. B. C. Ry. Co., 158 N. Y., 493.
- Sage vs. Culver, 147 N. Y., 241, at 246.
- Munson vs. Railroad Co., 103 N. Y., 72.
- Cowee vs. Cornell, 75 N. Y., 99.
- Cory vs. Leonard, 56 N. Y., 494
- Hoyle vs. Plattsburg R. R. Co., 54 N. Y.,  
314.
- Ogden vs. Murray, 39 N. Y., 202.
- Butts vs. Wood, 37 N. Y., 318.
- Gardner vs. Ogden, 22 N. Y., 327.
- Metropolitan El. R. R. Co., vs. Manhattan  
Elevated R. R. Co., 11 Daly, 373.
- Dayoue vs. Fanning, 2nd Johnson's Chanc.,  
252, at p. 255.
- West vs. Camden, 135 U. S., 507.
- Thomas vs. Brownville R. R. Co., 109 U.  
S., 522.
- Wardell vs. Railroad Co., 103 U. S., 651.
- Michoud vs. Zirod, 4th Howard, 506.
- Farmers' Loan & Trust Co. vs. Winona  
Southwestern Railway Co., 59 Fed., 960.
- Bill vs. Western Union Telegraph Co., 16  
Fed., 14.

- Booth vs. Land Tilling & Improvement Co.,  
59 Atl., 767 (Chancery Court, N. J.).
- Stewart vs. Lehigh Valley R. R. Co., 38  
N. J. Law, 522.
- Pearson vs. Railroad Co., 62 N. H., 537.
- Fisher vs. Concord Railroad Co., 50 N. H.,  
204.
- European N. A. Railway Co. vs. Poor, 59  
Me., 277.
- Davis vs. Grennell, 17 Atl. Rep., 259  
(Maryland).
- Cumberland Coal & Iron Co. vs. Parish, 42  
Md., 604.
- Rolling Stock Co. vs. Railroad, 34 Ohio  
St., 450.
- Goodin vs. Cincinnati & White Water  
Canal Co., 18 Ohio State, 169.
- Davis vs. Rock Creek Co., 55 Cal., 359.
- San Diego vs. San Diego & Los Angeles R.  
R. Co., 44 Cal., 106.
- Currie vs. School District, 35 Minn., 163.
- Jones vs. Morrison, 31 Minn., 140.
- Flint Railway Co. vs. Dewey, 14 Mich.,  
486.
- Higgins vs. Lansingh, 154 Ill., 301.
- Same vs. Same, 40 No. East. Rep., 362 (see  
part of opinion, pp. 378 *et seq.*).
- Gilman Railroad Co. vs. Kelly, 77 Ill.,  
426.
- Ryan vs. Leavenworth Railway Co., 21  
Kansas, 365.
- Cook vs. Berlin Woolen Mill Co., 43 Wis.,  
440.
- Morawetz on Private Corporations, §517-  
524.

In the above case, *Davoue vs. Fanning* (2d Johnson's Chanc., 252), the decision was by Chancellor Kent. He held that a Trustee could not at a public



sale be the purchaser for his wife, although his wife was one of the beneficiaries for whom the sale was made, and the price was fair. We quote from the opinion as follows:

"It is contended, on the part of the defendants, that this sale is not open to objection, inasmuch as it was at public auction, and *bona fide*, and for a fair price, and the purchase was not made for the benefit of the executor himself, but for the benefit of his wife, who was one of the *cestui que trusts*, having an interest in the land. But I am of opinion that these circumstances do not vary the application of the general rule." \* \* \*

"If, in selling a part of the estate, in the meantime, for a legacy to his wife, he could become a purchaser on her account, or constitute an agent for that purpose, the temptation to abuse of trust would be great and dangerous. Whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. Though the money he was raising was to go to the wife, it was no reason why he should be permitted to buy in for her the estate itself, when the plaintiff and others had also legacies to be raised out of the estate, and were equally entitled to their share of what should be remaining. His interest here interfered with his duty." \* \* \*

"The ground of the rule is, that though you may see, in a particular case, that he has not made advantage, it is impossible to examine sufficiently, in ninety-nine cases out of a hundred, whether he has made advantage or not." \* \* \*

"It was not requisite to show that the trustee had made any advantage by the purchase. If a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise; and yet the power of the Court would not be equal to detect the deception. Human infirmity will rarely permit a man to exert against himself that providence

which a vendor ought to exert, in order to sell the estate most advantageously for the *cestui que trusts*, and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price. If the Trustee cannot bid for himself, he cannot, on the same principle, bid for another. The distinction of its being a weaker temptation, is too thin to form a safe rule of justice."

In the case of *Munson vs. Railroad Company*, 103 N. Y., 70, the Court of Appeals had under consideration the questions hereinafter stated. Munson was a director of the Sodus Bay & Corning Railroad Company, organized in 1871 to construct a railroad between certain points. A mortgage was for the sum of \$1,500,000 to secure an issue of bonds for construction. The Company secured the right of way and graded about thirty (30) miles of its track, and expended in the aggregate about \$257,000, and bonds amounting to that sum were issued, of which Munson held 241, and 7 were held by another director. Subsequently Munson and the other director made a contract with one Magee, whereby they agreed to foreclose the mortgage, buy in the property and turn it over to Magee for the purpose of using it in the construction of a railroad which he proposed to organize and build. Subsequently Magee organized his railroad company, and Munson was elected a director and president, and a new contract was entered into between Munson, and his associates, and the new corporation, of which he was president, known as the Syracuse, Geneva & Corning Ry. Co., whereby he was to turn over the property thus acquired from the Sodus Bay Company. The Court of Appeals held the contract void. We quote from the opinion:

"In determining the legal question presented, it is proper to say that there is no evidence of any actual fraud or collusion on the part of

any of the parties to the original contract of August 13, 1875, or that the contract of assumption was induced by any improper appliances or motives whatever. It is plain that Magee and his associates when they entered into the original contract, contemplated building the proposed road on the line of the Sodus Bay and Corning Railroad, and that the contract was made with a view of acquiring for the new road, the rights of way and other property of that corporation. It is equally plain that the contract of assumption was entered into by the new corporation with the same expectation and for the same purpose. If the contract was otherwise unobjectionable, it could not, we think, be assailed on the ground that it was a contract outside of the power of the defendant corporation. The statute authorizes a railroad corporation to acquire land for its track and other necessary purposes, by voluntary purchase or by condemnation (Laws 1850, Chap. 140, §§14, 15), and an agreement made on the purchase of rights of way, to pay therefor in bonds of the purchasing corporation, secured by a mortgage on its property, is clearly, we think within the implied, if not within the express, powers of a railroad corporation (§28, subd. 10). The contract made between the defendant corporation and the plaintiffs, was in substance a contract to purchase rights of way, and although the defendants' line was not formally located on the line proposed to be purchased, and was in fact subsequently located on a different line, this change of purpose did not, we think, affect the question of corporate power.

But we are of opinion that the contract of September 14, 1875, is repugnant to the great rule of law which invalidates all contracts made by a Trustee or fiduciary, in which he is personally interested, at the election of the party he represents. There is no controversy as to the facts bringing the case as to Munson within the operation of the rule. He and his associates were

dealing with a corporation in which Munson was a director, in a matter where the interests of the contracting parties were, or might be in conflict. The contract bound the corporation to purchase, and Munson as one of the directors, participated in the action of the corporation in assuming the obligation, and in binding itself to pay the price primarily agreed upon between the plaintiffs and Magee. He stood in the attitude of selling as owner and purchasing as Trustee. The law permits no one to act in such inconsistent relations. It does not stop to enquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them as far as may be impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. It can make no difference in the application of the rule in this case, that Munson's associates were not themselves disabled from contracting with the corporation, or that Munson was only one of ten directors who voted in favor of the contract. The contract on its face, notified Munson's associates of his relation to the corporation, and that the contract was subject to be defeated on that ground, and on the other hand a corporation, in order to defeat a contract entered into by directors, in which one or more of them had a private interest, is not bound to show that the influence of the director or directors having the private interest, determined the action of the board. The law cannot accurately measure the influence of a Trustee with his associates, nor will it enter into the inquiry, in an action by the Trustee in his private capacity, to enforce the contract in the making

of which he participated. The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of Trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative.

The rule has been declared and enforced in a great variety of cases, but in none perhaps with more vigor and completeness, both upon principle and authority, than in the leading case of *Davoue vs. Fanning* (2 John. Ch., 251, 252). But the case of *Aberdeen Railway Company vs. Blaikie and others* (2 Eq., 1281), decided by the House of Lords, is in many of its features similar to the present one. In that case it appeared that the plaintiffs were a manufacturing firm, and that one of them was also a manager of the Aberdeen Railway Company, the defendant, and the chairman of the board. At a meeting of the managers, they, by resolution, authorized their engineer to contract for iron chairs needed by the company. The agent contracted with the plaintiff's firm. It did not appear that the member of the firm, who was also a manager and the chairman of the company, intermeddled with the dealing on either side, further than that it may be assumed he was at the meeting which authorized the engineer to procure a supply of chairs. The plaintiffs brought their suit to enforce specifically the performance of the contract, or in the alternative to recover damages for its non-performance. After a decision in their favor in the lower court, the company appealed to the House of Lords, where the ruling was unanimously reversed on the ground that the contract was condemned by the rules of equity, as having been made between the company of which one of the plaintiffs was a manager, and a private firm of which he was a member. The opinions of Lord Chancellor Cranworth and of

Lord Brougham vindicate upon impregnable grounds the general rule and its application to the particular case."

In the case of *Hoyle vs. Railroad Company*, 54 N. Y., 314, at p. 328, the Court of Appeals uses the following language in discussing the rule disqualifying directors from acting in transactions in which they were interested adversely to the corporation:

"He and his co-directors were together clothed with the power of managing the corporate property and conducting the affairs of the corporation. From this position arose the duty of managing and conducting its affairs to the best advantage, and the obligation not to let the private interests of any individual director compete with his duty toward the corporation. Whether a director of a corporation is to be called a Trustee or not, in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for his own private interests. He falls, therefore, within the great rule by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted, to deal, on his own behalf, in respect to any matter involved in such confidence (*Greenlaw vs. King*, 3 Beaven, 49, 61; *Gibson vs. Jeyes*, 6 Vesey, 278; *ex parte*, *Lacey*, 6 *id.*, 627.)"

\* \* \* \* \*

"The application of these principles to the case in hand would lead to the conclusion that Vilas, while director, and in view of that relation only, could not become a purchaser of the property of the corporation, except subject to its right to elect to disaffirm the sale and demand a resale. As director, it was his duty to prevent a sale if possible; and if not, then to endeavor to have the property produce the highest price; and, in order to the attainment



of these objects, to use the knowledge he had derived from the confidence reposed in him as director. As purchaser, on the other hand, it was his interest to pay as little as possible, and to use his special knowledge for his own advantage. Actual fraud or actual advantage do not need in such cases to be shown. (*Ex parte Lacey*, 6 Vesey, 627, and *Owen vs. Foulkes*, stated in note 1 to that case.)”

In the case of *Sage vs. Culver*, 147 N. Y., 241, at 246, the Court of Appeals say:

“There are, we think, at least two facts stated in the complaint or which are fairly to be gathered or implied from the allegations which are sufficient to require the defendants to answer: (1) It is alleged in substance, that the defendants, as officers and trustees of the defendant railroad, took from themselves, as trustees and officers, of another railroad, a lease of the latter, which they practically owned and managed, to the defendant corporation, at an exorbitant rent, which arrangement has the effect to unlawfully deplete the funds and earnings of the defendant corporation, and to injure the plaintiffs as stockholders therein. (2) It is also averred in substance, that the defendants, as officers and trustees of the defendant railroad, have taken from its treasury large sums of money, and paid the same to themselves as individuals, on account of alleged loans or advances made by them to the corporation of which the plaintiffs are stockholders; that they have concealed the origin and nature of this debt from the plaintiffs, and have made false statements in regard to the same. When a trustee or the officer or director of a corporation deals with himself, as an individual, or in the character of trustee, director or officers of another corporation, with respect to the funds, securities or property of the corporation, the transaction is at least open to question by the corporation, or, in a proper case, by its stockholders; and the trustee is bound to explain the transaction, and show that the

same was fair, and that no undue advantage has been taken by him of his position, for his own advantage; or the advantage of some other corporation in which he has an interest. When it can fairly be gathered from all the allegations of a complaint that the officers and directors of a corporation have made use of relations of trust and confidence in order to secure or promote some selfish interest, enough is then averred to get a court of equity in motion, and to require an answer from the defendants in regard to the facts. When it appears that the trustee or officer has violated the moral obligation to refrain from placing himself in relations which ordinarily produce a conflict between self-interest and integrity, there is, in equity, a presumption against the transaction, which he is required to explain. *Cowe vs. Cornell*, 75 N. Y., 100; *Crowe vs. Ballard*, 1 Ves., 221, note 2; *Gibson vs. Jeyes*, 6 Ves., 278; *Michoud vs. Girod*, 4 How., 553; *Butts vs. Wood*, 37 N. Y., 217; *Ogden vs. Murray*, 39 N. Y., 207; *Gardner vs. Ogden*, 22 N. Y., 332."

In the case of *Ogden vs. Murray*, 39 N. Y., 202, at p. 204 and at p. 207, it appeared that a steamship company had conveyed a large part of its property to certain of its directors to hold in trust, claiming as a reason therefor that it could not comply with certain laws of the United States relating to sailing vessels. The Court held, that the trustees, being themselves directors of the company, were as such directors, subject to all the duties, liabilities and rules applying to trustees. That branch of the case said:

"But the trustees were themselves directors of the company, and as such, were already trustees, bound to manage the affairs and property of the company for the interest of its stockholders, and by familiar and well settled principles of law, as well as the most obvious rules of justice, forbidden to administer its affairs for their private emolument.

There were seven directors. The creation of the trust and the designation of the trustees was authorized by a resolution passed at a meeting of the directors, at which they were present and voted; and, although they did not constitute a majority, their voice and influence was cast in favor of the arrangement by which the property, to the amount of \$1,350,000, purchased and paid for by the company, was placed in their hands. *Prima facie*, this act was, of itself, a breach of trust. The directors had *prima facie* no right to place the property in the hands of third persons, and thus put the title beyond the proper control of the board of directors, who were, by law, trustees for the control, employment and management of the property of the company, for the benefit of its stockholders.

\* \* \* \* \*

Whether it was for the interests of the stockholders to pay the purchase price and leave the title in third persons, subject to a charge by way of compensation therefor, and subject to any of the hazards consequent thereupon, was a subject of grave consideration in reference to which the directors, as trustees, were not at liberty to act under the influence of self-interest.

In this aspect of their relations to the subject the appellants and their associates were not in a situation permitting them to secure to themselves a personal advantage in the matter. The stockholders and creditors were entitled, not only to their vote in the board, but to their influence and argument in the discussion which led to the passage of the resolution, in pursuance of which they took title as trustees.

This brings the case within the rule, which rests in the soundest wisdom, and is sustained by the best consideration of the infirmities of our human nature, and called for by the only safe protection of the interests of *cestui que trusts*, or beneficiaries, viz:

That trustees, and persons standing in similar fiduciary relations shall not be permitted to exercise their powers and manage or appropriate the property of which they have control, for their own profit or emolument, or as it has been expressed, 'shall not take advantage of their situation to obtain any personal benefit to themselves at the expense of their *cestui que trust*' (Story's Eq. Jur., Sec. 466a; Hill on Trustees, 535).

This by no means assumes, that the trustees were not, in this case, in the actual exercise of the highest integrity. I cannot for a moment doubt that, in reference to the particular case before us, but the principle is one of great importance, and it forbids any inquiry into the honesty of a particular case. If it would have been competent to select their trustees disconnected from the company, still it was not competent for the directors themselves to create a trust of this description, consider and determine its expediency, and thereby create a claim to compensation in their own favor for the performance of its duties."

There is a full discussion of this question with copious citation of authority in the case of *Gardner vs. Ogden*, 22 N. Y., 327, at p. 343. We quote from the opinion of the Court of Appeals:

"The rule is clearly laid down by that learned and eminent writer, Lord St. Leonards, in his work on Vendors and Purchasers. (See Sugden on Ven. & Pur., 13th Ed., 566.) He says: 'It may be laid down as a general proposition that trustees, who have accepted the trust (unless they are nominally such, as trustees to preserve contingent remainders), agents, commissioners of bankrupts, assignees of bankrupts or their partners in business, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any person who, being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property them-

selves, except under the restriction which will shortly be mentioned. For, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest*'.

In *Fox vs. Mackreth* (2 Bro. C. C., 400) it was held by the Master of the Rolls (afterwards Lord Kenyon) and Lord Chancellor Thurlow, that trustee for the sale of estates for the payment of debts, who purchased them himself by taking undue advantage of the confidence reposed in him by the plaintiff, and who resold the same premises at a greatly advanced price, should be regarded as a trustee, as to the sums produced by such second sale, for the original owner. This decree was affirmed in the House of Lords in March, 1791 (4 Brown P. C., 258). Soon after this, Mackreth, the delinquent trustee, smarting under the just principles of law laid down by the Courts, sought to avenge himself for the wrong which he imagined had been done to him, by challenging Sir John Scott, afterwards Lord Eldon, one of the leading counsel for Fox, the plaintiff. No notice was taken of this challenge by Sir John Scott (Twiss' Life of Lord Eldon, Vol. 1, p. 218). And this case has ever remained as a leading authority, and one of peculiar interest.

In *Hall vs. Noyes* (3 Brown C. C., 483) a bill was filed by a widow of a *cestui que trust*, ten years after the sale of trust property by three trustees to one, and the purchaser was held a trustee for the widow. And it is a fact to be noted, that the price given by the trustee was more than could have been got from any one else.

In *Crowe vs. Ballard* (3 Bro. C. C., 117) the Lord Chancellor says: 'Ballard undertakes to sell a legacy, and pretends he took great pains so to do; then he buys it himself. This is alone

sufficient to set aside the transaction. It is impossible, at any rate, that the person employed to sell can be permitted to buy."

In *Whichcote vs. Lawrence* (3 Ves., 740) the Lord Chancellor says: "The real proposition, which is very plain in point of equity, and a principle of clear reasoning, is, that he who undertakes to act for another in any matter shall not, in the same matter, act for himself. Therefore, a trustee to sell shall not gain any advantage, by being himself the person to buy."

This principle was acted on by Lord King, in *Keech vs. Sanford* (Set. Cas., in Ch. 61), Oct. 31, 1726, he there said: "It might seem hard but the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule precluding him from purchasing should be strictly pursued, and not in the least relaxed."

In *Whepdale vs. Cookson* (1 Ves. Sr., 8) Lord Chancellor Hardwicke would not allow a purchase by a trustee to stand, although another person, being the highest bidder, bought it for him at a public sale. He said that he knew the dangerous consequences of permitting it; and it was not enough for the trustee to say you cannot prove any fraud, as it is in his power to conceal it. The whole doctrine is very fully reviewed by Lord Eldon, Chancellor, in *ex parte James* (8 Ves., 337).

It were useless to cite all the authorities in the book on this point. A few additional ones, as being of peculiar significance and importance will be referred to. Notice particularly should be taken of the case of *York Buildings Assn. vs. McKenzie*. It first appeared in 8 Brown's Parliamentary Cases by Torren, in appendix, 42; but has since been reported in 3 Peyton, 378. Chancellor Kent, in *Davoue vs. Fanning*, says of it, that it is a case too important to be omitted. He says that it is a complete vindication of the doctrine he applied in that case, and that, considering the eminent character of the counsel who were concerned in that case, and who had since filled the highest judicial station, and the ability and



learning which they displayed in the discussion, it is, perhaps, one of the most interesting on a mere technical rule of law, that is to be met with in the annals of our jurisprudence. He added, that the reasons of the House of Lords, for setting aside the sale are not given, and that we are left to infer them from the arguments upon which the appeal was founded. They have now appeared in the report in 3 Peyton. It is stated by the reporter in a note (1 Macq., 481), that the argument of this case lasted sixteen days, at two sessions of parliament (1794 and 1795). Judgment was rendered on the 17th. Lord Loughborough was, indeed, Chancellor then; but the tradition is, that Lord Thurlow (who had recently delivered the opinion in *Fox vs. Mackreth*), took the chief part in the hearing and deliberation. A person present at the time the judgment was pronounced, says in a note to the reporter, 'I have a very strong recollection of the very impressive speech of Lord Thurlow on the appeal of the *York Buildings Co. vs. Mackenzie*. I was present when Lord Loughborough, the Chancellor spoke, after Lord Thurlow.' The appellants were an insolvent company, and their estate was sold by the order of the Court of Sessions, at a public judicial sale, to satisfy creditors. The course at such sale, is to set up the property at a value fixed upon by the Court, which is called the up-set price, and which is fixed on information obtained and communicated to the Court by the common agent of the Court, who has the management of all the outdoor business of the cause. The respondent in the case was the common agent, and he purchased for himself at the up-set price; no person appearing to bid more, and the sale was confirmed by the Court; and in the course of 11 years' possession he had expended large sums for buildings and improvements. There was no question as to the fairness or integrity of the purchase. The object of the appellants was to set aside the sale, on the ground that the purchaser was the common agent in behalf of all parties to procure information and at-

tend the sale, and stood in the nature of a Trustee, and, therefore, disabled to purchase. On the part of the appellants it was contended that the sale in question was, *ipso jure*, void and null, because the respondent, from his office of common agent, was under a disability and incapacity which precluded him from being a purchaser. 'The office of common agent, in a ranking and sale, infers a natural disability; which *ex vi termini* imparts the highest legal disability, because a law which flows from nature, being founded on the reason and nature of the thing, is paramount to all positive law; that it is of no moment what the particular name or description, whether of character or office, situation or position, is, on which the disability attaches. *Tutor ait paulus rem pupilli emere non potest; idemque porrigendum ets ad similis id ets, ad curatores, procuratores, et qui negotia aliena gerunt.*' (Lib. 3 Sec. 7, ff. De Contract, emp. &c.) The reason of this law is implied in the nature of the case to which it is extended. Its energy does not consist in a distinction of mere words, that a tutor cannot be both seller and buyer; neither does it rest on another applicable enough adage, *nemo potest in res suam auctor esse*. This sentintia of the Roman jurisconsult is, that the tutor cannot buy his pupil's estate, because he has a trust and charge over his pupil, and, therefore, it is that the law is extended *ad similia*, and to all, *qui negotia aliena gerunt*. By this principle as the sound and substantial reason of the law, is to be interpreted that other text of the Pandects, which says: *Item ipse tutor, et emptoris et venditoris officio fungi non potest*' (L. 5 Sec. 7 ff. De Auct. & Cons., Tut and Cur). These views were not controverted by the counsel for the respondent; but they insisted that the sale could be maintained on other grounds. The opinions in the House of Lords were given by Lords Thurlow and Loughborough. The former said that all the gentlemen admit that it was the duty of the agent to carry on the sale to the utmost advantage for the benefit of the creditors, and those in-

terested in the residue; and taking it to be so one side said that being your situation, it is utterly impossible for you to perform that duty in such a manner as to derive an advantage to yourselves. He said, this seems to be a principle so exceedingly plain that it is, in its own nature, indisputable; for there can be no confidence placed unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it. In these views the Chancellor concurred; and the sale was set aside. Lord Eldon and Sir W. Grant designate this as *the* great case, and frequently refer to it.

In *Jeffrey vs. Aitken*, decided in Scotland in June, 1826, the Lord Ordinary observed, it is impossible to hold that the seller can also be the buyer of the subject, after the judgment of the House of Lords in the case of the *York Building Company vs. MacKenzie*. In *Hughes vs. Watson*, decided also in Scotland, January 20, 1846, the same rule as laid down in *MacKenzie's* case was reiterated and adhered to. Lord Jeffrey said: 'The principle involved in this case is a very familiar and general one in our laws. No person can be *actor in rem suam*. The stringency of the maxim has been ruled and held settled by the House of Lords in the case of *MacKenzie*. It is now *presumptio juris et de jure*, that where a person stands in these inconsistent relations of both buyer and seller, there are dangers, and it is not relevant to say that it is impossible there could be any in the particular case. I should be sorry to think that any doubt was thrown on this rigorous principle, which has been established both here and in the other end of the Island.' The whole subject is elaborately reviewed in the case of the *Aberdeen Railway Company vs. Blaikie Brothers* (1 Macq., 461, decided in the House of Lords, July 20, 1854. Lord Cranworth, in his opinion, says: 'An agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into

engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust* which it is possible to obtain. It may sometimes happen that the terms on which a Trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a Trustee, have been as good as could have been obtained from any other person; they may even at the time, have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform.' In these views Lord Brougham concurred (p. 483). To the same point may be cited *Lewis vs. Hilman* (3 House of Lords Cases, 607, 629, 630). *In re Bloyes, Trust* (1 Macnaughton and Gordon, 488, at p. 495), the rule is declared clearly and emphatically.

The same line of decision, in this State, has been uniform, and the cases are numerous where it has been recognized, affirmed, and rigorously applied. It would appear to have been first enunciated in the Supreme Court, in *Monroe and Others vs. Allaire* (per Kent, J., in *Bergen vs. Bennett*, 1 Caines' Cases in Error, 19). It was distinctly recognized in that case, as a sound and established rule (see pp. 19, 20). It received the unequivocal indorsement of the Court of Errors in *Monroe vs. Allaire* (2 Caines' Cases in Error, 183). Benson, J., in delivering the opinion of the Court, says: 'It is a principle that a Trustee can never be a purchaser, and I assume it as not requiring proof, that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud and those dangerous consequences which would ensue if

Trustees might themselves become purchasers, or if they were not in every respect kept within compass. Although it may, however, seem hard that the Trustees should be the only persons of all mankind who may not purchase, yet, for the very obvious consequences, it is proper that the rule should be strictly pursued, and not in the least relaxed.' Chancellor Kent, in *Davoue vs. Fanning*, hereafter cited, says that he cannot but notice the precision and accuracy with which the rule and the reason of it are here stated.

The next case in which this rule is affirmed is that of *Jackson vs. Van Dalfsen* (5 Johns., 43), in the Supreme Court. The whole subject received a most elaborate and searching examination by Chancellor Kent, in *Davoue vs. Fanning* (2 Johns. Ch. B., 252). The authorities are fully and carefully reviewed, and the powers of his great mind and his varied learning were brought to bear upon this discussion. It is the great case in our courts on this subject, and it will bear a favorable comparison with any other examination of this question. It settled the rule for this State, and has been recognized and adopted as authority by many of the courts of the sister States.

In harmony with these views are the cases of *De Caters vs. Le Ray de Chaumont* (3 Paige, 178); *Slade vs. Van Vechten* (11 *id.*, 26); *Poilen vs. Martin* (1 Sand. Ch. R., 569); *Jewett vs. Miller* (10 N. Y., 402); *Van Epps vs. Van Epps* (9 Paige, 327); *Torrey & Gilbert vs. Bank of Orleans* (9 *id.*, 469); *S. C.* (7 Hill, 260); *Hawley vs. Cramer* (4 Cow., 717); *Dobson vs. Racey* (4 Seld., 216); *Moore vs. Moore* (1 *id.*, 256).

This subject was very elaborately discussed in the case of *Michoud vs. Girod* (4 How. U. S., 503). The very able opinion of Mr. Justice Wayne leaves nothing new to be said. It contains a reference to and review of the cases and text writers bearing upon the question. Interesting cases on this question may also be found in 9 Barr., 284; 22 Penn., 320; 26 *id.*, 67, and 29 *id.*, 154."

In the case of *Continental Insurance Co. vs. N. Y. & Hudson River R. R.*, 187 N. Y., at p. 238, the Court of Appeals held that the rule we are discussing even extended to the majority of the stockholders of a corporation. We quote:

“We concede to its fullest extent the rule which ‘requires of the majority of the stockholders the utmost good faith in the control and management of the corporation, and in this respect the majority stand in much the same attitude towards the minority that directors stand towards all the stockholders’ (2 Cook Stock and Stockholders, Sec. 662). The safety of corporate investments depends on the maintenance of this principle in its fullest integrity. It was expressly affirmed by this Court in *Farmers’ Loan and Trust Company vs. N. Y. & Northern Railway Company*, 150 N. Y., 410.”

In the Continental Insurance Company case the contract in question was sustained upon the ground that it was fully ratified and confirmed by sufficient vote of the stockholders. At page 241 the Court points out that even throwing out the consideration of the shares owned by the common directors in two corporations, cast in favor of the compromise agreement in question, the affirmative vote of the balance of the stock was nine times the adverse vote.

Bearing upon another feature of this case, it is important to notice that at page 242 the Court uses this language:

“It is urged that the compromise agreement was in effect a new lease modifying the provision for rent reserved in the old lease, and that not sufficient in amount of the Central stockholders voted for its adoption to render the agreement valid in law as a lease. We concede that a modification of the lease must be executed with the same formalities and with the same vote as required by statute in the case



of an original lease. But we think that the vote of the Central Company's stockholders was sufficient. Under Chapter 433 of the Laws of 1893, the only requirement is that two-thirds of the stock voted upon at the meeting shall be cast in favor of the lease."

This decision is of the highest importance in this case, in view of the claim now advanced, that the expenditures and deductions from the proceeds of the sale of the \$3,000,000 of stock and the \$3,000,000 of bonds mentioned in the lease, shall be computed and arrived at in an entirely different manner than that provided by the lease itself.

It is conceded in the case that no modification or change of the lease, or any provision thereof, was at any time authorized by or even submitted to a shareholders' meeting of the plaintiff.

Therefore, the rights of the parties must be determined by the lease itself unaffected by any alleged verbal modifications.

In the case of *Bill vs. Western Union Telegraph Co.*, 16 Fed. Rep., 14, the opinion is by Judge Wallace.

The complaint was by a stockholder of the Gold & Stock Telegraph Co., who filed a bill to set aside a lease of property to the Western Union Company. Certain of the directors of the Gold & Stock Telegraph Co. were also directors of the Western Union. The Court held the lease void. We quote from the opinion at pages 16 and 17:

"Upon the second theory of complainant's case the inquiry arises whether, by reason of the relations sustained by the lessor's directors towards the lessee, their action in voting for the lease was in contravention of their duties to the lessors, and so obnoxious in the view of a court of equity as to render the lease void at the election of the lessor? It is well settled that if directors of a corporation enter into a con-

tract in its behalf with themselves as the other contracting party, the corporation may repudiate such contract.

In *Thomas vs. Brownville, etc., Ry. Co.*, 2 Fed. Rep., 877, it is held that a contract between a railroad company and a construction company is void where any of the directors of the railroad are members of the construction company, unless ratified by a board of disinterested directors. In *Wardell vs. Union Pac. R. Co.*, 4 Dill, 330, it is held that a contract made in behalf of the corporation by the executive committee of the board of directors, in which the members of the executive committee have a secret interest, is fraudulent as against the corporation, and the latter may repudiate it. Other authorities directly or impliedly decide that the contract may be upheld, if notwithstanding the presence of interested directors, there was a quorum of disinterested directors who participated in making the contract. *Butts vs. Wood*, 37 N. Y., 317; *Coleman vs. Second Ave. R. Co.*, 38 N. Y., 201; *U. S. Rolling Stock Co. vs. A. & G. W. R. Co.*, 34 Ohio St., 450; *Flagg vs. Manhattan Ry. Co.*, 10 Fed. Rep., 413.

These adjudications proceed upon the principle, familiar and elementary in the law of agency, that the same person cannot act for himself, and at the same time, and in the same transaction, as the agent of another whose interests are conflicting. If an agent to sell becomes the purchaser, or an agent to buy be himself the seller, a court of equity, upon the timely application of the principal, will presume that the transaction was injurious. Although the honesty of the agent may be unquestioned, and he may have attempted to exercise scrupulous impartiality as between his own interests and those of his principal, it is the right of the latter to repudiate the transaction. Directors of corporations are its agents, invested with wide powers and clothed with large discretion; they represent stockholders who are often practically voiceless in behalf of their own interest;

and they are held to the exercise of the utmost good faith in the administration of their trusts. They abuse the fiduciary relation which they sustain to the corporation and the stockholders, when they enter into contracts in which their private interests may antagonize the interests committed to their care. The law does not require the corporation to take the chances that the directors have not abused their position under such circumstances.

Practically and logically there can be no difference in the complexion of the transaction when the agent or the director, instead of interposing his personal interests between his principal and himself, interposes those of a third person. Undoubtedly the same person may be the agent of two distinct principals, and bind them both by his acts for each; but this is where he is expressly or impliedly authorized to act for each in the transaction with the other. Brokers fall within this category. But this does not advance the argument in favor of an agent who is selected for the sole duty of representing a single principal. The principal bargains for all the zeal and ability of his agent, and is entitled to their exertion in his own favor. He does not expect that his agent will place himself in a position where his obligations to another will raise a conflict of duties and interests. If the agent disregards his reasonable expectation, and attempts to serve two masters, the principal may assume that the agent has been unfaithful, and repudiate his acts. Applying these principles to the case in hand the conclusion is obvious. If the directors could not enter into a contract with the lessee which the lessor could not repudiate because of the peculiar relations existing between the lessee and the directors, they could not bind the lessor by a vote which was the equivalent of a contract, or was indispensable to the validity of the lease."

In the case of *Errin vs. Oregon Ry. & Navigation Co.*, 20 Fed., 577, the same learned Judge had be-

fore him a suit brought by minority stockholders of the Railway Company, complaining that the majority of the stockholders, who were authorized by law to dissolve the corporation and distribute its property, had availed themselves of their right to do so according to the form of law, but had sold the property to themselves at an unfair appraisal. At page 580 Judge WALLACE, after holding that the majority had the right to wind up the corporation at their election and that right could not be interfered with either at law or in equity, nor could the Court entertain any inquiry as to the motives which influenced them, proceeded:

“The right of the majority to sell the property to themselves at their own valuation is a very different matter; it cannot be implied from the contract of association and will not be tolerated by a Court of Equity. As is said by MELLISH, L. J., in *Menier vs. Hooper's Telegraph Works*, 9 L. J., Ch. App. Cas., 350-354, ‘although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet the majority cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them.’ If the majority sell the assets to themselves they must account for their fair value. They cannot bind the minority by fixing their own price upon the assets. A majority have no right to exercise the control over the corporate management which legitimately belongs to them for the purpose of appropriating the corporate property or its avails to themselves, or to any of the shareholders, to the exclusion or prejudice of the others.”

In the case of *Rolling Stock Co. vs. Railroad Co.*, 34 Ohio St., 450, at p. 460, it appears that the Rolling Stock Co. had made a lease to the Atlantic & Great Western R. Co. of a large amount of equip-

ment. The directors of the Rolling Stock Co. consisted of five persons, who were also directors of the Railroad Company. The latter, however, had thirteen directors, and at a meeting of its Board, at which eight directors were present, including only two of the five directors who were also in the Board of the Rolling Stock Co., a lease was made. In a suit for rentals, the Court said:

"The rule which prevents the agent or trustee from acting for himself in a matter where his interest would conflict with his duty, also prevents him from acting for another whose interest is adverse to that of the principal; and, in all cases where, without the assent of the principal, the agent has assumed to act in such double capacity, the principal may avoid the transaction at his election. No question of its fairness or unfairness can be raised. The law holds it constructively fraudulent, and voidable at the election of the principal. *Aberdeen Ry. Co. vs. Blaikie*, 1 Macqueen H. L. Cas., 461; *The York Buildings Co. vs. Mackenzie*, 3 Paton H. L., 378; *Bisham's Principles of Eq.*, 106, 18 Ohio St., 182."

One of the leading cases upon this subject is that of *Wardell vs. Railroad Company*, 103 U. S., 651, at p. 657. The Supreme Court in that case affirmed the opinion of Judge Dillon, the original Referee in the case at bar at circuit. The opinion of the Supreme Court was written by Mr. Justice Field. Briefly, the question involved was as follows: One Wardell and Godfrey obtained a contract from the Union Pacific Railroad Company, whereby they were to furnish all the coal for the company for a term of years at a high price fixed by the contract. When this contract was executed, it was privately agreed between some of the directors of the Railroad Company and Wardell that a corporation should be organized of which these railroad directors and Wardell should

be directors, which latter corporation was to assume the contract to furnish the coal. By reason of this adverse interest of the Union Pacific directors, the contract was held void. We quote from the opinion of Mr. Justice FIELD:

“It hardly requires argument to show that the scheme thus designed to enable the directors who authorized the contract, to divide with the contractors large sums which should have been saved to the company, was utterly indefensible and illegal. Those directors constituting the executive committee of the board, were clothed with power to manage the affairs of the company for the benefit of its stockholders and creditors. Their character as agents forbade the exercise of their powers for their own personal ends against the interest of the company. They were thereby precluded from deriving any advantage from contracts, made by their authority as directors, except through the company for which they acted. Their position was one of great trust, and to engage in any matter for their personal advantage inconsistent with it was to violate their duty and to commit a fraud upon the company.

It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interests and duty; and, ‘constituted as humanity is, in the majority of cases duty would be overborne in the struggle.’ *March vs. Whitmore*, 21 Wall., 178, 183. The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to



other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration. *Great Luxembourg Railway Co. vs. Magnay*, 25 Beav., 586; *Benson vs. Heathorn*, 1 Y. & Col. C. C., 326; *Flint & Pere Marquette Ry. Co. vs. Dewey*, 14 Mich., 477; *European & North American Ry. Co. vs. Poor*, 59 Me., 277; *Drury vs. Cross*, 7 Wall., 299.

The scheme disclosed here has no feature which relieves it of its fraudulent character, and the contract of July 16, 1868, which was an essential part of it, must go down with it. It was a fraudulent proceeding on the part of the directors and contractors who devised and carried it into execution, not only against the company, but also against the government, which had largely contributed to its aid by the loan of bonds and by the grant of lands. By the very terms of the charter of the company five per cent. of its net earnings were to be paid to the government. Those earnings were necessarily reduced by every transaction which took from the company its legitimate profits. It is true that some of the directors who approved of or did not dissent from the contract, early stated that they held their stock in the

coal company for the benefit of the railroad company and transferred it, or were ready to transfer it to the latter, but the majority expressed such a purpose only when the character and terms of the contract became known and they were desirous to screen themselves from censure for their conduct."

In the case of *Farmers' Loan & Trust Company vs. N. Y. & Northern Ry. Co.*, 150 N. Y., 410, the Court had under consideration the question as to whether it would enter a decree for the foreclosure of a mortgage on the property of the Railroad Company and for a sale of the same, when the bonds were owned by another railroad corporation, which had also secured the control of a majority of the stock of the mortgagor company, and had conducted the business and affairs of such company in such a way as to bring about a default, upon which the right to foreclose was predicated. The parties defending against the foreclosure were minority stockholders who had intervened in the foreclosure suit. The case was argued on their behalf by Mr. Carter, and they prevailed in the litigation, although it appears that for the reason that no stay had been granted (a decree having been entered in favor of the plaintiff in the Court below), the property had already been sold before the opinion of the Court of Appeals was handed down. This is shown by subsequent litigation concerning the same matter. The opinion of the Court of Appeals is unanimous in favor of the minority stockholders, and in the opinion the Court cites approvingly and digests a considerable number of cases. On page 430 the Court quotes the following approvingly from *2 Cook Stock and Stockholders*, page 945:

"The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the ma-

jority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders. Thus, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority upon an application by the latter. \* \* \* The same principle is stated in 1 Morawetz on Private Corporation (2d ed., §529); 1 Beach on Private Corporations (§70); 2 Bigelow on Frauds (§645, and Beach on Modern Eq. Juris. (§§132, 686)."

*Barr vs. N. Y., L. E. & W. R. R. Co.*, 125 N. Y., 263, involved the validity of a lease by the Erie of the Suspension Bridge Company made when the directors of the Erie were owners of the Construction Company which built the Bridge Company's lines. The Erie had not paid the rental called for by the lease, and neither the Bridge Company nor the Erie had attempted to set aside the lease, but the action was brought to recover the rentals called for by the lease.

The Court of Appeals held that in the absence of any complaint by either Company or by the stockholders of either Company, that the lease was voidable on the ground that it was authorized by directors disqualified to act, the Erie must continue to pay the rental prescribed. In the course of the discussion Judge GRAY said at p. 274:

"That the contract of lease was voidable and quite indefensible, because of the immoral conduct of directors, who abused their trust in procuring its execution, I quite concede. The proofs could lead to no other finding than that the lease and the rental guarantees were the work of a combination, or syndicate, composed of members from the boards of directors of the two companies, who caused the same to be made

by the Erie Company for purposes of their own individual gain and in fraud of that company's rights. The identity of certain of the directors of each company, when the lease was made; the interest of four of these common directors in the contract for the construction of the Suspension Bridge road and in the stock and bonds to be guaranteed, as a condition of the leasing of the road, stamped the whole transaction as a fraud upon the Erie Company and brought it under the condemnation of the rule which forbids those who fill fiduciary positions from making use of them to benefit their personal interests. This rule is deservedly strict in its requirements and operation. It extends to all transactions where the individual's personal interest may be brought into conflict with his acts in a fiduciary capacity, and it works independently of the questions of whether there was fraud, or whether there was a good intention. Where the possibility of such a conflict exists, there is the danger intended to be guarded against by the absoluteness of the rule (*Davoue vs. Fanning*, 2 Johns. Ch., 260; *Barnes vs. Brown*, 80 N. Y., 527)."

*Flynn vs. Brooklyn City Railroad Company*, 158 N. Y., 493, was an action brought by a stockholder of the defendant to set aside the lease involved in the present litigation. The Court of Appeals decided that the plaintiff had no standing to maintain the action, because he had not requested the Brooklyn City Railroad Company to commence such an action, and in the course of the discussion Judge VANN, at p. 507, said:

"While Courts cannot compel directors or stockholders, proceeding by the vote of a majority to act wisely, they can compel them to act honestly, or undo their work if they act otherwise. Where a majority of the directors, or stockholders, or both, acting in bad faith, carry into effect a scheme which, even if lawful upon its face, is intended to circumvent the minority stockholders and defraud them out of their

legal rights, the Courts interfere and remedy the wrong. Action on the part of directors or stockholders, pursuant to a fraudulent scheme designed to injure the other stockholders, will sustain an action by the corporation, or, if it refuses to act, by a stockholder in its stead for the benefit of all the injured stockholders. (Leslie vs. Lorillard, 110 N. Y., 519, 535; Gamble vs. Queens County Water Co., 123 N. Y., 91; Sage vs. Culver, 147 N. Y., 245; Farmers' Loan & Trust Co. vs. N. Y. & N. Ry. Co., 150 N. Y., 410; Hawes vs. Oakland, 104 U. S., 450.) When a contract founded in fraud is executed by the directors with a third party upon the express approval of a required number of stockholders, with the intention on the part of all concerned to defraud the non-assenting stockholders, and the scheme will naturally result in serious injury to them or to the corporation, a court of equity will set aside the fraudulent transaction and compel the delinquent parties to account."

In the case of *Higgins vs. Lansingh*, 154 Ill., 301, same case, 40 N. E. Rep., 362, the Court refused to uphold a settlement made between a corporation and its creditors, where the majority of the quorum of the directors approving such settlement were interested, either as creditors, or, in the case of one of such directors, as the trustee for certain creditors. A discussion of this question will be found in the report of the case in 40 N. E. Rep., at pp. 378 to 383 inclusive. The learned Court cites and quotes from a great number of authorities in the English Courts and in the Federal and State Courts in this country, and also from text writers. This case is peculiarly important to this discussion, by reason of the fact that there, as in the case at bar, an alleged settlement had been in form entered into, but was approved by directors who were disqualified to act.

In the case of *Gilman, Clinton, &c., R. R. Co. vs. Kelly*, 77 Ill., 426, at p. 432, the directors

of the Railroad Company had approved and authorized the execution of a construction contract with the Morgan Construction Company. After the vote approving such contract, certain of the directors of the Railroad Company became stockholders in the Construction Company. The Court held that the contract was absolutely voidable at the election of the Railroad Company, although it was made in good faith and there was no fraud in fact, and that there would be no inquiry into the question whether it was fraudulent in fact.

We quote from the opinion :

"The Court did not, by its decree, find there was any fraud, in fact, in the making of the construction contract with the Morgan Improvement Company. Indeed, the evidence would not justify any such finding. The subject of any director taking stock in that company had not been suggested before the making of the contract. The first mention of it was made to Mr. Melvin, on the same day, but after the contract had been signed. Mr. Williams was not then a director. With one exception, the directors all thought the contract was the most favorable one that could be obtained. The stockholders' meeting to which it was submitted was well satisfied with it, and, by a unanimous vote, passed a resolution of thanks to the board of directors for having procured it. When the matter was first mentioned to complainant Kelly, he expressed the belief it was a favorable contract. There can be no doubt the contract with the Morgan Improvement Company was entered into with the utmost good faith. No fraud, in fact, existed, nor was any contemplated by the directors of the railroad company.

The vital question is, whether it was lawful for any number of the directors of the railroad company to become members and stockholders in the Morgan Improvement Company, with whom they had a construction contract.



Whether the contract was originally valid, is not now an important subject of inquiry; for if it was illegal for the directors to become members of the construction company and participate in the profits, if any should be realized, that fact would establish a right in complainants to have an account taken, as clearly as though the contract, in the first instance, was unlawful. The same conclusion would inevitably follow, and the result, so far as the participating directors are concerned, would be the same.

We are inclined to adopt the latter view, viz.: that no director could rightfully become a member of the improvement company, with whom the railroad company had a contract to furnish the means with which to build the road, with a view to share in the profits, and that if any gains should be realized in the enterprise, they would belong to the railroad company, upon the equitable principle which forbids the trustee, or person acting in a fiduciary capacity, from speculating out of the subject of the trust. It was not alone to facilitate the enterprise in which they were engaged the directors became members of the construction company, although it does appear that fact gave increased confidence to the contractors doing the labor, that they would ultimately get their pay. The sole object of becoming members and stockholders in that company was to realize gains. The duties devolving on a director of the railroad company were in antagonism with his interest and relation to the improvement company. What might be to the advantage of one company might be detrimental to the best interests of the other. A reference to the terms of the contract will make this view apparent.

The railroad company had in charge the actual construction and superintendence of the building of the road. It was its duty, under the contract, to let all contracts for grading, bridging and laying the track, subject only to the approval of the improvement company. In any event, the latter company was to have an

agreed sum for every mile of track. Its interests would be to get the work done as cheap as possible. On the other hand, it was the duty of the directors to secure the construction of a good road, at whatever the increased cost might be.

In this connection it may be noted, as showing the inconsistent relations assumed by the directors, that the contract obligated the railroad company to issue to the Morgan Improvement Company the balance of the untaken stock, which was, in fact, a majority of all the stock of the company. It is admitted the stock was assigned with the avowed purpose of giving to the improvement company the control of the affairs of the railroad company, that no changes should be made of its officers, or new directors elected, without its consent and approval. The reason assigned for it is the stock was of no real value, and the construction company could not be induced to take hold of the work unless it had a controlling interest in the stock. It was expressly provided the contract was not to be binding upon the Morgan Improvement Company, if any change should be made in the board of directors or officers of the railroad company without its consent or approval.

The directors of a railroad company are, in an important sense, regarded as trustees for the stockholders, and it would be a breach of duty to transfer that trust; to assume obligations inconsistent with that relation; to place themselves in opposition to the interests of the stockholders, or in such position where their own individual interests would prevent them from acting for the best interests of those they represent. The rule is the same that applies to all persons acting in any fiduciary capacity, that requires the utmost fidelity to the interests of the *cestui que trust*. The rule, in its general sense, embraces every relation in which they may, by any possibility, arise a conflict between the duty to the person with whom the trustee is dealing, or on whose account he is

acting, and his own individual interest. 'It acts,' as is well expressed by Mr. Justice Wayne, 'not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability, in many cases, and the danger, in all cases, that the dictates of self-interest, will exercise a predominant influence, and supersede that of duty'. *Michoud vs. Gerod*, 4 How., 503.

It may be added, the rule stands on the obligation which a party owes to himself and his principal, that forbids him to assume a position which would ordinarily excite a conflict between his individual interest and a faithful discharge of his fiduciary duties. It operates to restrain all agents or trustees, public or private. The inquiry is not whether the contract the Trustee has made is the best that could have been made for the *cestui que trust*, or whether it is fraudulent in fact. So strictly is this principle adhered to, that no question is allowed to be raised as to fairness of the contract. The principle has a broader scope. The law has absolutely inhibited the Agent or Trustee from placing himself in a position where his own private interests would naturally tend to make him neglectful of his obligations to his principal, or where his position would afford him an opportunity to speculate in the trust property. Accordingly, it is not indispensable there should be actual injury before the act of the Trustee will be declared void, as being interdicted by the policy of the law. The *cestui que trust* has his election, to ratify the act of the Trustee, and insist upon all the advantage of it, or disaffirm it in toto, as shall be most to his interest. *The People vs. The Township Board*, 11 Mich., 222; *F. and P. M. Ry. Co. vs. Dewey*, 14 Mich., 477; *Aberdeen Ry. Co. vs. Blackie*, 1 M'Queen R., 461; *E. and N. A. Ry. Co. vs. Poor*, 59 *ib.*, 277; *Hoffman Steam Coal Co. vs. Cumberland Coal and Iron Co.*, 16 Md., 456; *Cumberland Coal Co. vs. Sherman*, 30 Barb., 553.

The principles stated are applicable to the case at bar. Originally the contract with the Morgan Improvement Company may have been one the directors could, with propriety, make, but a director of a railroad company cannot make a contract on behalf of the company in which he reserves a private interest, nor can he subsequently become interested in its execution with a view to participate in the profits of the contract. Either act will render the contract void, at the election of the *cestui que trust*."

In the case of *San Diego vs. San Diego & Los Angeles Railroad Company*, 44 Cal., 106, at p. 113, it appears that the Legislature of California had authorized the President and Trustees of the City of San Diego to donate and convey to the Railroad Company not exceeding 5,600 acres of the Pueblo lands of said City upon such terms as they might determine. The Trustees were McCoy, Estudillo and Sherman. By a vote of the three Trustees, Estudillo and Sherman voting in the affirmative and McCoy in the negative, a conveyance was made. At the time Sherman was the owner of stock in the Railroad Company, to the amount of \$10,000. The Court held that his interest in the corporation disqualified him to act as a Trustee of the City, and said:

"The general principle is, that no man can faithfully serve two masters, whose interests are or may be in conflict. The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. 'It may be regarded', says Parsons, 'as a prevailing principle of the law, that an agent must not put himself, during his agency, in a position which is adverse to that of his principal. For even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon, yet the principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to

demand the exertion of all this in his own favor' (1 Pars. on Cont., 74). This principle has found expression in a large number of cases, involving a great variety of circumstances. And it applies equally, whether one deals with himself, acting as sole Trustee; or, with a Board of Trustees, of which he is a member; or with the Directors of a corporation of whom he is one."

In *Ryan vs. Leavenworth Ry. Co.*, 21 Kansas, 365, at p. 397, it appears that certain persons organized a railroad company. Later on a construction company was formed composed of practically the same persons who had organized and were in control as directors of the railroad company. A representative of the construction company appeared before the Board of Directors of the railroad company, of whom at least two were members of the construction company, and entered into a contract with the directors for the construction of a road. It was held in a suit brought by and on behalf of the stockholders to avoid the construction contract that the plaintiffs should prevail. The Court said:

"In view of these statements, we can arrive at no other rational conclusion than that the said contract, executed by Smith, on the part of the Missouri River Railroad Company, and A. Caldwell, for himself and his partners, was a gross fraud upon that corporation, and upon its stockholders who were not interested in the contract. This contract was secured through the votes and influence of members of the directory, who were directly interested in the procurement of such contract. And the president of the corporation, in executing the same, while nominally representing the corporation, was really acting adverse to its interests and the interests of its stockholders, and in the promotion of gain to himself and his co-partners. The elementary text-books of authority on the subject of corporations lay down the rule that



the fiduciary character of directors is such that the law will not permit them to manage the affairs of the corporation for their personal and private advantage, when their duty would require them to work for, and use reasonable efforts for the general interests of the corporation and its stockholders and creditors. The directors are the primary agents of the corporation, and this relation requires of them the highest and most scrupulous good faith in their transactions for the corporation, and the general rule that no Trustee can derive any benefit from dealing with these funds, of which he is a Trustee, applies with still greater force to the state of things in which the interest of the Trustee deprives the corporation of the benefit of his advice and assistance. Courts of Equity always regard with great jealousy the contracts made between directors and the corporation, and, as a general rule, such contracts are voidable at the instance of the corporation or stockholders. This doctrine applies whether the directors are a party to the contract in its inception, or whether they subsequently acquire an interest in it. As directors cannot acquire an interest, directly or indirectly, adverse to the corporation, if they, taking advantage of their knowledge and position, make even an advantageous bargain in the purchase of claims against the corporation, the profits thus made will be treated as held in trust for the company. *Field, Corp.* §174, 175, 396, 397; *Hale vs. Bridge Co.*, 8 Kan., 466. In conclusion upon this point, applying to the allegation of the petition the law as above stated, holding the contract void, we may very appropriately adopt the language of Mr. Justice Miller, in the case of *Wardell vs. Union Pac. R. Co.*, 5 Cent. Law J., 527: 'The corporation is represented by an agent, who controls both sides of the contract, and whose interest is in every way against his principal, and in his own favor. While the glaring evil of this thing may be obscured by using the name of the corporation as one party, and that of individuals having no connection with the cor-



poration as the other party, the danger that selfish greed will make for the agents of the corporation a contract of which they will reap the advantage, and in which the corporation will suffer all the losses, is only increased by the fact that the names of the parties really interested do not appear in the transaction.' ”

In the case of *Jones vs. Morrison*, 31 Minn., 140, at p. 148, the Supreme Court of that State used the following language with reference to contracts made by directors of a corporation in which such directors have an interest adverse to that of the corporation:

“They are agents of the corporation, and, as in cases of other agents, their acts on behalf of their principal, in matters where their own interest come in conflict with those of the corporation, where their self-interest may tend to deprive the corporation of the full, free and impartial exercise of the judgment and discretion which they owe to their principal, are looked upon and scrutinized with great jealousy by the Courts. Their acts in such cases are *prima facie*, voidable at the election of the corporation or of a stockholder. *Cumberland Coal, &c., Co. vs. Parish*, 42 Md., 598; *Butts vs. Wood*, 37 N. Y., 317; *Coleman vs. Second Ave. R. Co.*, 38 N. Y., 201; *Hoyle vs. Plattsburgh & M. R. Co.*, 54 N. Y., 314; *Blake vs. Buffalo Creek R. Co.*, 56 N. Y., 485; *Covington, etc., R. Co. vs. Bowler*, 9 Bush, 468; *Paine vs. Lake Erie, etc., R. Co.*, 31 Ind., 283; *Port vs. Russell*, 36 Ind., 60; *Cook vs. Berlin Woolen Mill Co.*, 43 Wis., 433; *European, &c., Ry. Co. vs. Poor*, 59 Me., 277; *Bestor vs. Wathen*, 60 Ill., 138; *Harts vs. Brown*, 77 Ill., 226; *Simons vs. Vulcan Oil, etc., Co.*, 61 Pa. St., 202; *Rice's Appeal*, 79 Pa. St., 168; *First Nat. Bank vs. Gifford*, 47 Iowa, 575; *Gardner vs. Butler*, 30 N. J., Eq., 702.”

The case of *Pearson vs. Railroad Company*, 62 N. H., 537, contains an elaborate discussion of the question here under consideration. The Northern Railroad Company of that State had contracts with

the Concord Company and certain other companies, for the interchange of traffic, and desiring a more advantageous contract, the directors and officers of the Northern Company purchased the controlling interest of the stock of what were known as the "lower companies", and elected themselves as a majority of the Board of Directors of such "lower companies", and entered into contracts with them, which it was claimed by a stockholder of a "lower company" bringing the suit, were more advantageous to the Northern Company and less advantageous to the "lower companies." In this case the Supreme Court of New Hampshire used the following language:

"A director of a railroad corporation, though not technically a Trustee, stands in a fiduciary relation to the corporation, and is under the disability of a Trustee. Practically, the directors are Trustees and the stockholders are the *cestui que trust*. Like all other persons where this relation exists, he cannot, as buyer for his corporation, buy of himself against the objection of his *cestui que trust*, nor as seller for the corporation become the purchaser, nor, being its agent and Trustee, contract with himself, or secure to himself advantages not common to other stockholders, because such contracts and relations are likely to bring him in conflict with his duty and self-interest and tempt him to be unfaithful to the superior obligations he has assumed. Pierce R. R., 36; Mor. Corp., §245; Ang. & A. Corp., §§233, note a312; Butts vs. Wood, 37 N. Y., 317; Hoyle vs. Railroad, 54 N. Y., 314, 328; Blake vs. Railroad, 56 N. Y., 485, 490; Barnes vs. Brown, 80 N. Y., 527, 535; Duncomb vs. Railroad, 84 N. Y., 190, 198; Robinson vs. Smith, 3 Paige, 222, 232; Koehler vs. Company, 2 Black, 715, 721; Bliss vs. Matteson, 45 N. Y., 22; 1 Per. Tr., §207; Booth vs. Robinson, 55 Md., 419, 436, 440. \* \* \*

This case is within that class where the agent to sell is precluded by the policy of the law

from purchasing. The Northern B. C. & M. and Concord companies are connecting roads. The upper companies have the right by statute to require the Concord to haul their passengers and freight over its road upon paying reasonable tolls therefor, and in turn they are required to do the same for the Concord. Rates for such transportation must be fixed by contract, or by Referees appointed by the Court upon petition of one of the parties (G. L. c. 164, §§3-9). The statute has provided a remedy, simple, adequate, inexpensive, expeditious and effectual. The upper companies, feeling aggrieved by the tolls charged by the Concord, declined to seek redress under the statute, but sought a remedy by disabling the Concord to contract with them, and undertook to contract with a board of directors elected by themselves. The relation of the upper companies to the Concord was that of buyer and seller. The upper companies desired to purchase of the Concord the transportation of their freight and passengers over the road of the latter. The Concord desired to sell the transportation over its own road of the traffic of the upper roads. It was for the interest of the upper companies to procure the lowest rates, and their directors were bound to use the knowledge they had derived from the confidence reposed in them as directors to attain that result; and the interest of the Concord was to procure the highest rates, and its directors were bound to use their special knowledge, for the advantage of that company. Their interests being conflicting, it was impossible for common directors to procure the lowest rates for one party and the highest rates for the other. 'No man can serve two masters.' They were not arbitrators, called in to adjust conflicting claims, nor were they disinterested. The Referee has found that the purchase of Concord stock at prices largely in excess of its market value was made with the intent and purpose of obtaining control of the Concord, and thereby to secure more favorable contracts for the business of the upper compa-

nies over the lower. The plan was formed, the purchase was made, the control of the Concord was obtained, and more favorable contracts were secured. By taking the control of the Concord, the upper companies disabled it as a contracting party. *In fixing the rates of that company for their business they were contracting with themselves. When a transaction is a fraud in law, it is unnecessary to prove a fraud in fact, nor is it permissible to show that the transaction was an honest one. Coburn vs. Pickering, 3 N. H., 415a. The justness of the contracts made with themselves and of the votes they passed as directors of the Concord Railroad for their own benefit does not impart any validity or legality to those contracts for votes. If such contracts were to stand until shown to be fraudulent and corrupt, the result as a general rule, would be that they must be enforced in spite of fraud or corruption. Railway Co. vs. Dewey, 14 Mich., 477. \* \* \**

The immediate government and direction of the affairs of the Concord Railroad are, by its charter, vested in a board of seven directors, to be chosen by the members of the corporation. In the exercise of the director's powers the stockholders have no voice and no vote. They are as powerless as a ward in the hands of a guardian annually elected by himself. The law requires of a guardian self-denial, integrity, diligent attention, an eye single to the interest of his ward, and that he be above mercenary motives (*Sparhawk vs. Allen, 21 N. H., 9, 26*)—qualities no less requisite in a director in the discharge of his duty. To whom shall the stockholders look with confidence that their interests will be protected but to their directors? And when the stockholders' interests are sacrificed, or threatened, they may have no other resort for adequate protection except to a court of chancery. This is a case where equity is called upon to interpose its aid in behalf of the stockholders. *March vs. Railroad, 40 N. H., 548, 567. \* \* \**

We have no such statute, but reason and common sense, and all the analogies of the law, for-

bid that a person should act in a position of trust when self-interest conflicts with duty. The conscience of men in such positions will not stand the strain of self-interest. We approve the remarks of WELCH, J., in *Goodwin vs. Canal Co.*, 18 Ohio St., 169: 'A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests, which are in conflict with those of the company, he ought to resign. No matter if a majority of the stockholders as well as himself have personal interests in conflict with those of the company. He does not represent them as persons, or represent their personal interest. He represents them as stockholders, and their interests as such.'

\* \* \* \* \*

In *Butts vs. Wood*, 38 Barb., 181—S. C., 37 N. Y., 317—the action of the majority of two in a board of three, passing upon the claim of a third director, who also voted, was set aside at the instance of one of the stockholders. See also *Wardens of St. James vs. Rector, &c.*, Ch. of the Redeemer, 45 Barb., 356; *Kitchen vs. Railroad*, 69 Mo., 224; *Railroad vs. Kelly*, 77 Ill., 426; *Koehler vs. Black, etc.*, Iron Co., 2 Black, 720; *Mor. Corp.*, 245 and cases; 1 Per. Tr., §207 and cases; *Pierce R. R.*, 36-40 and cases; *Green Bri. Ult.*, V. 477, n. (a) and cases. Stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussion. *Ogden vs. Murray*, 39 N. Y., 202, 207; *Railway Co. vs. Blaikie*, 1 Macq. (H. L. Cas.), 461, where the Court said: 'It was Mr. Blaikie's duty to give his codirectors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject.' In *Barnes vs. Brown*, 80 N. Y., 527, 536, the Court said: 'If he (plaintiff) had attempted to perform the contract while he was director, the stockholders could probably have intervened by some suit in equity adapted to the nature of the case to nullify

the contract as to him, or to restrain him as to the performance thereof, or to compel him to elect to resign his office of director, or to give up the contract.

Our conclusion upon this part of the case, is that the directors of the Concord could not make the contracts with the upper companies, nor settle the claims of those companies against the Concord. For the transaction of that part of the business of their office they were disabled by the understanding on which the purpose for which, and the interest in and by which, they were elected."

In the case of *Flint & Pere Marquette R. R. Co. vs. Dewey*, 14 Mich., at pp. 486-7, Judge CHRISTIANCY made the following remarks as to contracts entered into by officers and directors of a corporation, in which they represented the corporation, although adversely interested in the contracts:

"The defendant and Hazelton, president and secretary of the company, with Draker, another director, are appointed a committee for the purpose of letting a contract for the construction and equipment of the road. It was their duty in letting the contract, to use their best efforts and their best judgment to promote the interests of the company, by securing the best terms they could obtain for the company. \* \* \* But it is idle to multiply words upon such a defense; certainly nothing short of a ratification by the board, after a full explanation and knowledge of their interest and of all the circumstances, could render such a contract binding upon the company. And I think it at least questionable whether a ratification by the board with such knowledge could render it valid, while Dewey and Hazelton remained influential members of the board, especially if they took any part in such ratification. But, as there does not appear to have been any such ratification, we need not discuss this question.

It is possible there may have been no actual fraud, and that the contract could not have



been let on better terms, but the principle of law applicable to such a contract renders it immaterial, under the circumstances of this case, whether there has been any fraud in fact, or any injury to the company. 'Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal.' Per MANNING, J., in *People vs. Township Bd. of Overijssel*, 11 Mich., 225. And, 'if such contracts were held valid until shown to be fraudulent and corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud and corruption.' S. C., 228. See also *Clute vs. Barron*, 2 Mich., 192; *Dwight et al. vs. Blackmar*, 2 *Id.*, 330; 1 L. Cas. in Eq. (*Fox vs. Mackreth*), 92 and notes."

In addition to the cases we have digested, we invite the Court's careful attention to the other cases cited above. We refrain from quoting from them, because of the great length to which the brief will be extended, and they are merely other examples of the same principle which underlies all of the decisions.

## Supreme Court, Kings County.

THE BROOKLYN HEIGHTS RAIL-  
ROAD COMPANY,

Plaintiff,

against

THE BROOKLYN CITY RAILROAD  
COMPANY,  
Defendant.

Before Hon. D  
Cady Herrick,  
Referee.

### Defendant's Trial Brief.

This action was originally brought to recover the sum of approximately two millions of dollars expended by the defendant in the conversion of its railroad from horse power to electricity, after it had fully made, executed and completed its lease thereof to the plaintiff and before the plaintiff had entered into actual possession, it being the contention of the plaintiff that such an amount was not chargeable to it under the terms of the lease.

This claim and contention has been so thoroughly exploded in law and fact by the evidence that it is no longer entertainable by an honest or reasonable mind.

## PRELIMINARILY.

It may be said with confidence at the outset that, under a true and fair construction of the lease, it makes no difference at what time or under what circumstances the money was expended so long as it was expended at the plaintiff's request and went to the conversion of the railroad in the manner stated.

Section IV of the lease provides, in short that all money, credits and securities on hand at the date the lease shall take effect, less the amount required to discharge the debts or liabilities of the lessor and less the amount of its surplus earnings, shall be used, applied and expended by the lessor in payment, at the request of the lessee, from time to time of the cost of converting the railroad into an electric railroad.

In Section XXII it is provided, in short, that in the event that the said moneys belonging to the said lessor, on hand at the date this lease shall take effect, and the proceeds of said stock and bonds of said lessor authorized to be issued, but unissued, shall be insufficient to pay and discharge the cost of converting the said railroad and railroads of the lessor into an electric railroad, then, in that event, the lessee will forthwith furnish and supply all such sums of money, materials and supplies as may be requisite and necessary for that purpose, and will proceed faithfully and diligently with the work of constructing and converting said railroad and railroads into an electric railroad.

Obviously, the purpose and intendment of these two clauses of the lease was to the effect that the

lessor should devote all the moneys it had on hand, minus its debts and its surplus and all the moneys arising from the future sale of its stocks and bonds, to the work of conversion; and thereupon all its financial obligations, in this particular, should cease, and, if there remain any other or further work of this character, it was to be done and paid for by the lessee.

In other words, the defendant being a corporation, its power to raise money was limited by the provisions of its charter, the vote of its stockholders and the resolution of its board of directors. The amount thus obtainable by the defendant was known and is described in the lease, and, so long as that amount was expended, it was a matter of no consequence to the plaintiff when the expenditure occurred.

#### POINT FIRST.

**Assuming, however, the plaintiff's construction of the lease to be correct, namely: that Six millions of dollars, arising from the stocks and bonds, as well as the money on hand, subject to the matters in diminution thereof mentioned in the lease, were to be expended by the defendant after the lease took effect, to wit, after June 6, 1893, its claim, founded upon this ground, has been exterminated by the proofs.**

It is competent for parties to a written contract to alter or modify it by parol in respect to matters

in furtherance of the objects of the contract and in beneficial support of those objects.

General El. Co. v. Nat. Contracting Co.,  
178 N. Y., 369.

McCreery v. Day, 119 N. Y., 1.

Thomson v. Poor, 147 N. Y., 402.

Chapin v. Dobson, 78 N. Y., 74.

That Hollins and Company represented the lessee in the negotiations preliminary to the lease and represented the lessee in the making of the lease and represented the lessee in all matters concerning the lease and the property demised, from the inception in 1892, up to a date long subsequent to June 6, 1893, is abundantly shown. Hollins and Company made the first proposition for a lease. Upon its rejection, they made the second proposition for a lease which was accepted. They alone conducted all the negotiations in behalf of the syndicate or inchoate corporations which were to become the virtual owners of the properties comprised in the lease. They had direction and control, in behalf of the lessee, of the composition of the lease. They owned all the stock of the lessee. They filled its board of directors and controlled their action. The propositions they made to the defendant, their promises and assurances, the terms which, at their suggestion, were embodied in the lease, and their representations, contracts and promises were accepted and ratified by the plaintiff and the defendant was bound to recognize them as the authorized agents to deal with the defendant in the plaintiff's behalf in any urgent matters occurring at the date of the execution of the lease, requiring attention, in furtherance of the objects of the lease and of importance to the property rights and financial interests of both parties, involved in the lease and its practical operation.

Their right to act as agents of the plaintiff, in respect to any exigency arising in the practical work of conversion and to be recognized by the defendant as such agents in such an emergency cannot be questioned, and even if less authority were derivable from their acts, prior to the time in question, and prior to the complete adoption and ratification of those acts by the plaintiff, it is abundantly shown that, after their oral directions and agreements had been made and those acts had been performed, upon coming to the knowledge of the officers and directors of the plaintiff, they were fully ratified and confirmed. And all the intendments, promises and agreements, made by them after February 14th, 1893, the date of the lease, were approved, confirmed and ratified by the plaintiff.

BERNARD J. BURKE, called in behalf of defendant, testifies that he is a member of the firm of H. B. Hollins & Co., bankers, New York City, and was a member of that firm in 1892 and 1893. Our firm originated the scheme for acquiring the railroads in the City of Brooklyn at least so far as the Brooklyn City R. R. Co. is concerned, and converting them into electric rather than horse power. In furtherance of that scheme, we bought the stock of the Brooklyn Heights Railroad Company at about that time or before and controlled absolutely every share of it. We first made the proposition to lease the property of the Brooklyn City R. R. Company in 1892. (Minutes, pp. 3194, 3195). The first was rejected; the second proposition, which according to the minutes of the Brooklyn City R. R. Company was made on December 12, 1892, was accepted. The minutes say: "The chair stated the object of the meeting to be the consideration of an amended proposi-



tion submitted by Messrs. Hollins & Co.," which was approved and "referred back to the executive and advisory committees for completion and perfection of details. Carried unanimously." The minutes speak of the proposition as "perfected by the Executive Committee and the New York Guaranty and Indemnity Company in behalf of a syndicate." The Board then resolved to submit the same to the Executive Committee, and said committee was directed to have prepared by counsel a lease of the railroad and properties of the company in connection with the counsel for the New York Guaranty and Indemnity Company, which lease, when executed, was to be subject to the approval of the stockholders. A paper prepared by the New York Guaranty and Indemnity Company, embodying the principal points of the proposition was then read. The chair was authorized to submit the paper to the press. (Minutes, pp. 3195-3198.) Mr. Burke testified that the New York Guaranty and Indemnity Company represented us in this matter, and the lease was prepared under our directions as far as the Brooklyn Heights Company was concerned, and the Long Island Traction Company there to be formed, was concerned. In connection with the testimony of Mr. Burke the circular was introduced describing the scheme upon which the lease was to be made. The formation of a syndicate to procure and make the lease, the organization of a corporation, called the Long Island Traction Company, which is to be the successor to the Heights Company and the terms on which its stock was to be subscribed and held, etc. (Minutes, vol. 6, pp. 3199-3199*d*.) Mr. Burke then testified: "This circular contained our proposition." Further, he testifies that the lease between the Brooklyn City R. R. Company and the Brooklyn Heights R. R. Com-

pany is dated Feb. 14, 1893, and was negotiated, prepared and so far as the plaintiff and the Traction Company were concerned, was executed under our direction and control altogether. (Minutes, vol. 6, pp. 3199*d*, 3200.)

At the time of the service of the Markey injunction, on February 15, 1893, the work of conversion was in its early stages and could not have gone far as we were expediting the work at that time.

Q. Did you have any conversation with Mr. Lewis, the president of this road, in respect to the continuance of work by the Brooklyn City Railroad Company after the service of the Markey injunction, on that day?

Mr. Severance: Answer that yes or no.

A. Certainly, we did.

Q. What was it?

Mr. Severance: Objected to as incompetent, irrelevant and immaterial.

(Followed by a long discussion, (Vol. 6, 3201-3217).

The Referee: I will admit the evidence at present and overrule your objection.

The substance of my conversation then with Mr. Lewis was that Mr. Lewis should proceed with the construction for our account, that is, the Long Island Traction, the Brooklyn Heights, that was the substance of the instructions, I understand.

Q. What request did you make of him, if any?

Same objection, ruling and exception.

A. That he proceed with the work of reconstruction. By that I mean the work of conversion, from

a horse railroad to electric, in which we were then engaged.

By the Referee:

Q. When was this conversation? A. It was about the day after or the same day of a meeting of stockholders at the time that the lease was to be confirmed, at the time the injunction was served; the exact dates there is a record of somewhere.

Q. You say you requested the City Road, through Mr. Lewis, to go on with the work of conversion? A. I mean to say the request was made of Mr. Lewis; I was present at the time. Whether I made the request or whether Mr. Hollins did, or our counsel, I don't know, but it was made there at the time, and in fact, I proceeded with Mr. Lewis in the reconstruction work.

By the Referee:

Q. What representative of your firm was present besides yourself? A. Mr. Hollins, undoubtedly, if I remember, and Mr. Lowery, who represented us. I think Mr. Auerbach was there.

Q. Did you, or any of those people who represented you, make a request in substance that this man proceed with the work? A. Unquestionably.

Mr. Hatch: We object to that because we think that is a legal question; it calls for a conclusion; I move to strike it out.

Motion denied.

Mr. DeWitt: Can you give me from memory the substance of your interview on that subject (a conversation between the witness and the officers of the City Company concerning a verbal agreement between them that the City Railroad was to continue the work at the expense provided for

in the contract), with these officers of the City Road?

Same objection; objection overruled; exception.

A. It was that the work be proceeded with by the City Railway people out of the funds which were to come to us.

By the Referee:

Q. Was the work proceeded with?

Same objection, ruling and exception.

A. It was.

(Minutes, vol. 6, pp. 3218-3224.)

Q. You did not personally attend to any of the construction of this railroad? A. My recollection is: I was in daily touch with it; I kept, I remember, in pretty close touch with it.

Q. I ask you, if you attended personally to the construction of the road? A. No, not personally; I think we approved contracts for the work.

Q. What was your connection with the firm of Hollins & Company? A. I have been a partner twenty years or more.

Q. You still are? A. I still am.

Q. Until what period did your firm control the stock of the Brooklyn Heights Railroad Company, hold or control it?

Mr. Severance: Objected to as immaterial.

Objection overruled. Exception.

A. Until the time it was turned over to the Long Island Traction Company.

(Minutes, vol. 6, p. 3227.)

HARRY B. HOLLINS, called in behalf of defendant, testifies as follows:

I am the head of the firm of H. B. Hollins & Company. I was the author and representative of a syndicate that in 1892 or 1893 proposed to purchase the tramways of the Brooklyn City Railway Company. My first conversation was with Mr. Daniel F. Lewis, and then after that I was brought in contact with the directors of the Brooklyn City Company, notably Mr. Legget. We met quite frequently, in the course of these negotiations, and they continued over a period of several months.

We finally obtained a lease of the railroad properties of the Brooklyn City Company, and were, at that time and previous thereto, the owners and controllers of the stock of the Brooklyn Heights Railroad Company. I remember the stockholders' meeting held for the approval of the lease (Minutes, pp. 32-42), and remember distinctly the Markey injunction against the Heights Company against the carrying out of the lease.

There was some time necessary after the execution of the lease, on February 14, 1893, and its approval on February 15, 1893, for the putting up of the \$4,000,000 security.

By Mr. DeWitt :

Q. What I want to ask you is, what conversations or arrangements were made with the Brooklyn City Railroad Company, represented by Mr. Lewis, in respect to the continuance of the work of conversion of the road from horse to electricity between February 14, 1893, and the date that the lease should take effect.

Mr. Severance : Objected to as incompetent, irrelevant and immaterial and tending to vary the contents of the lease.

Objection overruled. Exception.

\* \* \* \* \*

A. That was the basis of the conversation that we didn't want any interruption to occur, and, after several interviews, it was, as I remember, agreed that the work should continue.

Mr. Severance. Objected to.

The Referee: State what was said.

(Minutes, vol. 6, pp. 3241-3245).

\* \* \* \* \*

Q. What was the substance of your conversations with Mr. Lewis? We don't expect you to give the exact language. A. It was that I talked it over with Mr. Lewis and urged that the work proceed, and that it was most important, and we recognized——

Referee: What did he say?

A. And he agreed——

Referee: No—what did he say?

A. He said that it was unquestionably desirable that the work proceed—that we had already electrified a certain amount of the lines, and, of course, the results were very apparent what it would be on the whole system, and every hour's delay meant a loss of thousands and thousands of dollars to us.

(Minutes, vol. 6, p. 3245.)

(Also see circular of H. B. Hollins & Co., setting forth advantages of lease; Minutes, vol. 6, pp. 3245-3248.)

Q. Is it not a fact that as rapidly as the conversion from horse to electricity was made there was a great increase in the revenues of the Company arising out of public travel?

Mr. Severance: Objected to as immaterial.

Objection overruled. Exception.

A. There was a great increase.



Q. You were aware of that fact at the time?  
 A. I was.

(Minutes, vol. 6, p. 3248.)

I called Mr. Lewis' attention to our connection with other traction companies where they had changed the motive power from horse to electricity, and gave him the comparative percentage of increase, showing the advantage of having the work proceed as quickly as possible, and the showing in Brooklyn, where we had already made some changes. I emphasized the fact that it was our desire to proceed with all possible rapidity.

\* \* \* \* \*

Q. What did you say to Mr. Lewis on that subject, I mean the subject of proceeding as rapidly as possible with the work of construction and how the expense was to be met?

Same objection, ruling and exception.

A. I emphasized, as I said, the fact of the increase which was very manifest, and I urged Mr. Lewis to proceed with his contract as rapidly as possible.

By the Referee:

Q. What if anything, did you say to him as to how the expense was to be met?

Same objection, ruling and exception.

A. The Brooklyn City Railway Company were to proceed with the work and receive credit for the money that they expended in construction.

By Mr. DeWitt:

Q. Did the Brooklyn City go on with the work?

Same objection, ruling and exception.

A. As I remember, they did.

Q. You were in frequent touch and communica-

tion with Mr. Lewis and the Brooklyn City Company in that respect? A. Practically daily; I might say daily. The work was proceeding all along the line. I took upon myself the organization of the Long Island Traction Company. As I remember we did own and control the stock of the Brooklyn Heights Railroad Company and we, H. B. Hollins & Company, organized the Long Island Traction Company (Minutes, vol. 6, pp. 3258-3260).

*Cross-examination by Mr. Severance:* I hoped that the City Company would use what funds it had on hand for the work of construction; I talked with them a great many times about it, in fact as far as I remember we used to come up together on the Long Island train at that time, and I was saying daily that it was very desirable that we should proceed, and it was in our opinion the best way of providing the funds in view of this injunction (Minutes, vol. 6, p. 3264).

DANIEL F. LEWIS, called as a witness, in behalf of defendant, testified as follows:

I first became connected with the Brooklyn City Railroad in June, 1868, as ticket agent, and was elected President in December, 1886, serving in that capacity for a little over nine years, and resigning February 1st, 1894.

(Minutes, p. 3229.)

At the time of making this lease we had expended the proceeds largely of a previous issue of three millions of capital stock in the work of conversion, if I remember correctly. I think Hollins & Company approached us with a general proposition, whether it took the form of a lease at that time or not, I do not remember, in midsummer or early fall of 1892.

I remember the accepted proposition of Hollins & Company for the lease of the road, which acceptance was had on December 12, 1892. Prior to the acceptance and drafting of the lease I saw Messrs. Hollins & Company very frequently from the time negotiations were opened in respect to that subject.

(Minutes, vol. 6, pp. 3232-3234.)

With the exception of Mr. Goodwin, now dead, formerly Vice-President of the Kings County Elevated Railroad, Hollins & Company conducted entirely all the negotiations. The conferring parties in the draft of the lease were the officers of the two companies and their counsel, and Hollins & Company, who were represented by counsel, and figured very prominently all the way through at all the sessions. Julien T. Davies, Joseph Auerbach and Mr. Lowery represented Hollins & Company in the early history and all during the pendency of these negotiations. Mr. William C. Trull represented the Brooklyn City Company.

The officers of the companies were largely figure-heads, as I recall it, and the parties who met in the composition of that lease, the consideration of its various sections and general outlines, were the attorneys, counsel of Messrs. Hollins & Company, and myself representing the Brooklyn City Company, and at intervals we had necessary conferences with our executive officers and Mr. Trull as counsel.

(Minutes, vol. 6, pp. 3234-3236.)

At the time the lease was executed the stock of the Brooklyn Heights Company was owned by Hollins & Company and their representatives. I remember the Markey injunction. I think it was served on me after the vote of the stock-

holders had been taken for the ratification of the lease, which was on February 15, 1893. This injunction was not one against the Brooklyn City carrying on the work. After the service of this injunction I had conversations with Hollins & Company, the people who represented the lessee, as to what should be done.

(Minutes, vol. 6, pp. 3236, 3237.)

At that time the Brooklyn City railways were in a very considerably upset condition, not only the railroad—sometimes that applies in an ordinary sense to tracks, but that isn't a railroad; we had depots, we had, perhaps, power stations, we had other buildings which required alterations, we had property to acquire, we had contracts to make, and we were in the midst of all that very heavy work which required day and night to cover at that time, and was absolutely indispensable to the work of conversion from horse to electricity. These disturbances interfered very much with public travel.

(Minutes, p. 3238).

\* \* \* \* \*

The Referee: Strike that out. Just state as near as you can what was said by you or by Hollins, or whoever represented them.

A. I don't know exactly how to put it before your Honor to show you what conversation took place, to show that there was an agreement between us. They not only desired, but stated that they desired the work to be continued, and the conversation which took place on that occasion substantially resulted in the request on the part of Hollins & Company and the agreement.

Mr. Hatch: I object to that.

By the Referee :

Q. What did they state ? What did Hollins say to you about going on with the work, if anything ?

A. He said to me among other things that he regretted the injunction, and that steps would have to be taken to protect the interest of both parties ; he stated that it is desirable to proceed with the work ; he and I together stated, as men will on occasions of that kind that it would be necessary in order to continue this work to use the funds of the Brooklyn City Railroad Company, to be expended for the purpose, whether such funds were those then on hand or properly any other funds which might accumulate either from the earnings of the company or the proceeds of the bonds and stock to be sold by the Brooklyn City Railroad Company as referred to in the lease, until possession under the lease could be effected, I recited generally the work in progress.

Q. That is, you told him the work that was being done ? A. Yes, on February 15th, 1893; and what had been ordered. This was February 15th, the day after the lease had been voted on by the stockholders of the Brooklyn City Railroad Company. What had been done and also what was necessary to immediately be undertaken to properly protect the interests of the Brooklyn City Railroad Company if it were to continue its business, or the Brooklyn Heights Company if it took over the railroad under the lease. Now, boiled down from a long interview under great stress, that was the result of our conversation.

By Mr. DeWitt :

Q. Did you go on with the work of conversion, pursuant to that understanding with Mr. Hollins ?

Same objection, ruling and exception.

A. I did. (Minutes, vol. 6, pp. 3239-3241).

This work of conversion was carried on after February 14th by the Brooklyn City until its funds were exhausted.

By the Referee:

Q. Did you stop constructing before that time (June 6th, 1893)? A. No, sir.

By Mr. DeWitt:

Q. You kept on from February 14th until June 6th? A. Steadily.

Q. During that interval were the officers and directors of the Heights Company or Hollins & Company aware of the continuation of the work?

Mr. Severance: Objected to as incompetent.

\* \* \* \*

The Referee: That I want to examine, as to how far that is true really. I will allow the question.

Exception.

A. Yes, the officers were generally familiar.

By the Referee:

Q. How do you know that? A. Because I talked with them.

By Mr. DeWitt:

They were over on the work and in my office at intervals. Mr. Hollins and I came down in the club car every morning; he was at Islip and I at Babylon, and we went back frequently in the afternoon, almost generally in the afternoon, so that we practically were constantly in touch. (Minutes, vol. 6, pp. 3271-3273).

JOSEPH S. AUERBACH, called in behalf of defendant, testified as follows:



Direct-examination by Mr. De Witt:

I am a lawyer and was such as early as 1890.

Q. Yes, I would like to have a narrative, a history of the thing, the negotiations, the lease, and so forth. A. The counsel were Mr. Trull, representing the Brooklyn City, Mr. Davies, representing the Guaranty Company, I think it was the New York Guaranty and Indemnity Company, now the Guaranty Trust Company; representatives of the syndicate; Mr. Hollins was also prominently identified with it, and that firm was our special client, the firm Lowery, Stone and Auerbach then.

The syndicate consisted of Hollins & Company and their associates. At about the time of the acceptance, December 29, 1892, by the Brooklyn City Company of the proposition to rent their lines, I had consultations concerning the proposition and I took part in the drawing of the lease.

H. B. Hollins & Company owned or held the stock of the Brooklyn Heights Company at that time. They made a prior proposition that was rejected.

I remember the approval of the lease by the stockholders about the middle of February, 1893. There were injunction papers served on that day on both companies in an action brought by Markey. It was an action enjoining the carrying out of the lease. We had a consultation on that day. The conversations were several, immediately following the service of the injunction; they were consultations with Mr. Trull, Mr. Davies, who was then a member of the firm of Davies, Short & Townsend, and Mr. Lowry, and I think Mr. Stone. Mr. Hollins and Mr. Burke and Mr. Stone were present. Mr. Hollins and Mr. Burke and Mr. Stone were present.

(Minutes, vol. 7, pp. 3486-3488.)

The Brooklyn City Company was under an obligation under its contract to proceed with this work of construction, and, if I recall, those agreements had been entered into before the lease was entered into. The lease provided that the proceeds of certain bonds and stock not then expended in the work of reconstruction should be expended under the terms of the lease; when the Markey injunction was served the parties were confronted with that condition of things. The Brooklyn City Company was under an obligation to construct for its own account, if the lease became ineffective, and for the account of the lessee if it became effective, under the terms of the lease; and everybody who was connected with the project, whether it was the Brooklyn City or the Brooklyn Heights Company, of course, were anxious and desirous that the work of construction should be pushed; interruption of it was believed to be impossible by everybody; that was not among the contemplatable things; because the Brooklyn City Company was under an obligation, aside from this lease, of completing its own contract.

Q. What instructions, if any, were given to Mr. Lewis with respect to it? A. I don't know that they might be called instructions, they were requests made from time to time after the service of the injunction to press the work of reconstruction, because the company was not realizing the benefit it would get from the reconstructed road, nor was it getting, in the opinion of those identified with this project, the full benefit of it even as a horse car railroad, with the large interruptions to the service. (Minutes, vol. 7, pp. 3490, 3491.)

Without regard to any lease I should say the Brooklyn City was under an obligation under its contracts to carry on the reconstruction for its own account, and, under the terms of the lease, for the

account of the lessee, the Brooklyn Heights Company.

Q. It needs clearing up. I would like to have you clear it up. Just what was the understanding with respect to the work during the interval of the Markey injunction? A. Between the people you have named as conferring at or about the time the injunction was served? My understanding of the conclusion reached between the parties was that in case the lease became effective, whatever expenditures were made between the service of the injunction and the lease taking effect was to be an expenditure made under the terms of the lease for the account of the lessee.

I say that Hollins & Company were the holders of the stock of that company, and represented a syndicate that was carrying on the negotiations for the leasing of these properties. The directors of the Brooklyn Heights Company then were Harry Nicholas, Mr. Hollins' brother-in-law; Messrs. Tol-free, Young, Watson, Stanton, Kennedy and Martin were Mr. Hollins' friends. Mr. Eldridge was a great friend of Mr. Hollins; he was the son of the president of the Knickerbocker Trust Company, of which Mr. Hollins was a director. They came to be directors by Mr. Hollins' designation. (Minutes, vol. 7, pp. 3492-3494.)

There were additions to the directorate after January 9, 1893. Those directors—George G. Haven, Jr., Mr. Timpson, Mr. Peabody—I assume, represented the interests of the Guaranty & Indemnity Company.

As part of this scheme for the lease of this road provision was made for the organization of a traction company, which was to hold all the stock of the Heights Company and the stock of which traction company the stockholders of the Brooklyn City Company were given an opportunity to subscribe

for upon the terms set forth. I know Mr. Samuel B. Lawrence who made the agreement with the traction company to transfer all of the stock of the Heights Company in consideration of the deposit of the stock of the traction company for subscription under the lease; he was an intermediary, my recollection is. Mr. Lawrence is a cousin of Mr. Julien T. Davies, one of the counsel in this transaction. In the making of that contract, which was carried out, he acted at the request of Hollins & Company.

(Minutes, vol. 7, pp. 3494, 3495.)

*Cross-examination* by Mr. Severance :

Prior to the making of the lease my client in the matter was Hollins & Company. Mr. Davies represented the Guaranty Company, which, I think, was more than a depository of the gauranty fund; it was, I think, the representative depository of the syndicate. Mr. Davies and myself were both connected with the transaction from the start.

(Minutes, vol. 7, p. 3513).

DAVID G. LEGGET, called in behalf of the defendant, testifies as follows :

The continuance of the work of conversion by the City Company after February 15th, 1893, was at the request of Hollins & Company.

(Minutes, vol. 6, pp. 3426, 3427).

## POINT SECOND.

**Indubitably as a matter of fact and of plain literary interpretation, this lease is not susceptible of any other construction than that it went into effect when duly executed by the officers of both companies and approved by the votes of their stockholders.**

Among the things demised which passed *eo instanti* upon the making of the lease was every franchise, right, privilege and easement owned, possessed or exercised by said lessor, as respects the construction, maintenance or operation of said railroad or railroads; and all and every franchise, right and easement owned, possessed or exercised by said lessor, to construct, maintain or operate a railroad; and the lessee was to have and to hold the said railroad and railroads, real estate, improvements and appurtenances, franchises, rights, privileges, easements and grants, for the term of nine hundred and ninety-nine years. (See Lease, § 1, final paragraphs).

The lessee took the right to sell and dispose of all horses, cars and materials not required for further use in the construction and maintenance and operation of said railroad and to apply the proceeds, realized upon any such sale, to such extensions, branches, additions and equipments to said railroads as might be approved by the lessor. (Lease, § XII).

The entire capitalization possible by the lessor is described, provided and fixed by the terms of the lease. Indeed it had to be, fundamentally, so as to limit and fix the rental, namely, ten (10) per centum.

on the stock and the interest on the bonds. In § XIV of the lease, it is provided that the lessee takes the premises demised for nine hundred and ninety-nine (999) years at an annual rental of ten (10) per centum per annum upon "the capital stock of the lessor from time to time outstanding, not in excess of twelve million dollars (\$12,000,000) " and also as an additional rental the interest upon its bonds, "not in excess of six million, nine hundred and twenty-five thousand dollars (\$6,925,000): and also for the renewal of such bonds during the protracted period of the lease."

Section XV. provides that the lessee shall pay all taxes, assessments, license fees, car licenses, water rents, charges and impositions whatsoever, whether ordinary or extraordinary, levied or assessed upon the lessor, its capital or shares of capital stock or dividends of the said demised railroad or railroads, real estate, personal property, franchises or easements, or any part thereof, or for the use or enjoyment thereof, by State, municipal or other authority.

Section XVI. provides that the lessee shall pay all reasonable expenses of keeping up the organization of the lessor.

Section XVII. provides that the lessee shall pay all rentals which, under the terms of any contract, agreement or lease then existing between the lessor and any person or corporation respecting any of its properties.

Section XVIII. provides that any mortgage thereafter issued by the lessor in payment or redemption or renewal of any outstanding bonds of the lessor or outstanding bonds assumed by the lessor, shall



not be subject to this lease, but that the lien of any such mortgage or mortgages upon the property by this lease granted and demised shall take precedence of and constitute a prior lien to this lease and to any and all liens created by this lease and to any franchise, right, privilege, property or interest acquired by the lessee under the terms of this lease; provided, always, that the principal of any such mortgage or mortgages shall not exceed the sum of \$6,925,000.

Then follow the clauses of the lease which provide that the amount stated, namely, \$12,000,000 in stock and \$6,925,000 in bonds, shall exhaust the power of the lessor to issue stock and bonds; wherein it is provided that under no circumstances and by no act shall its debt be further increased and that, when this amount of indebtedness is reached, no further indebtedness for the conversion or construction of the road shall be incurred by the lessor.

Section XXI. expressly provides:

The lessee further covenants and agrees that it shall not have the right to and will not make or construct any extensions, additions, branches, and improvements, or furnish any equipments to the said railroad and railroads and properties by this lease demised to be paid for out of its own funds other than such as shall be necessary to keep said railroads and properties in good condition and repair, and to preserve efficiency in the operation of said railroad until after the said unissued stock and bonds of the lessor shall have been issued and the proceeds realized upon the sale of said stock and bonds shall have been expended as in this lease provided, and that it will not construct or apply for the right to construct any extension or branch of

said railroad or railroads without first obtaining the consent in writing of the lessor thereto.

Section XXII provides:

The lessee further covenants and agrees that it will proceed faithfully and diligently with the work of converting the said railroad and railroads into an electric railroad, or into such other kind of railroad as shall be approved by the lessor and lessee; and that in the event that the said moneys belonging to the lessor on hand at the date this lease takes effect, after the deductions aforesaid and the proceeds of said stock and bonds of said lessor authorized to be issued, but unissued, shall be insufficient to pay and discharge the cost of converting the said railroad and railroads of the lessor into an electric railroad, or into such other kind of railroad as may be agreed upon by the lessor and lessee, that then and in that event the lessee will forthwith furnish and supply all such sums of money, materials and supplies as may be requisite and necessary for that purpose, and will proceed faithfully and diligently with the work of constructing and converting said railroad and railroads into an electric railroad or such other kind of railroad as may be agreed upon by the lessor and lessee.

Here are two provisions making it entirely and conclusively clear that the amount of the capitalization of the lessor shall constitute the limit of all expenditures by the lessor upon the work of conversion and construction of the electric railroads, and that upon the happening of that expenditure all further moneys, requisite for that purpose, are to be furnished by the lessee.

And Section XXVII. goes on to provide that all other expenditures for operating and running the

railroad or railroads, maintaining its branches, in holding the real estate and properties by this lease demised, keeping the same in repair and well insured, in short, all the further expenses shall be borne by the lessee.

Sections XXIX. and XXX. are to the same effect as is § XXXIV.

Section XLIV. declares that nothing in this lease contained is intended, or shall be construed as authorizing the lessee to increase the funded debt of the lessor.

So it is manifest from these several clauses, which constitute the chief body of the lease, that in no emergency and under no circumstances, and by no event should the capitalization or debts of the lessor exceed, in round sum, the amount of \$18,925,000, which, it is conceded, has been already issued and is now outstanding.

This unavoidable construction of the lease, as a matter of law, is fatal to the plaintiff's claim.

The last clause of the lease provides:

"It is mutually covenanted and agreed between the lessor and lessee that this lease shall not be binding or valid as to either of the parties hereto until approved by the vote of the stockholders of the lessor and lessee as required by law."

This clause contains a negative pregnant and is the equivalent of an express provision that the lease shall be binding and valid when approved by the stockholders.

The subsequent provisions which delay the individual delivery of the lease to the lessee until the

\$4,000,000 guaranty fund shall have been actually deposited were manifestly designed to suspend the practical operations of the lease until the happening of that event; and the phrase therein contained, "shall not go into effect" is therein used as synonymous with the phrase "nor shall the lessee be entitled to enter into possession of the premises and property by this lease demised until said four million dollars (\$4,000,000) shall have been actually deposited."

(I.)

**The plaintiff's construction, which would limit the operation of this lease to the 6th of June, 1893, is at war with all the fundamental facts and cardinal features of the lease itself.**

As shown in the negotiations between the lessor and the lessee; by the circular composed and issued under the direction and with the approval of the syndicate representing the lessee; and by several clauses contained in the lease itself, the capital stock and bonds of the company were not in the ultimate to exceed, all told and together, the sum of \$18,925,000. This amount, upon the making of the lease, exhausted the lessor's power to go into debt or to make expenditures. And upon this amount and this amount alone, the lessee was to pay rentals equivalent to 10 per cent. upon the stock and interest on the bonds of the lessor.

Under these circumstances to say that the lessor was bound to supply \$6,000,000 after June 6, 1893, out of the \$6,000,000 authorized to be issued but unissued on February 14, 1893, would be to post-

pone the prosecution of the work of conversion for four months, during which the railroads would be in a confused and largely inoperative condition, to the great detriment of all parties concerned, or to continue such work at an outlay of nearly \$2,000,000, as a naked gratuity from the lessor to the lessee in the betterment of an estate already demised. This would put the lessor in the position of one who, having sold a tract of land for a palace, with a cellar already built thereon, should go on after the execution of the deed, at an expense of \$2,000,000, in the construction of a palace without any obligation so to do and at an absolute loss to himself.

The grim irony of Prof. Collin in his opening is worth considering (*Minutes*, vol. 1, pp. 51-56). He says we did it because we would get the product of the two millions back at the end of the lease; that is, we threw two millions away in the betterment of the estate demised because we were going to get back the resurrected tracks, power houses and railway cars at least nine hundred and ninety-nine years after they had perished from the earth. Such a claim needs only to be stated to be exploded.

The proposition to lease, submitted by the lessee, adopted by the lessor and by it submitted to its stockholders, plainly provides that the lessor shall be secure of 10 per cent. net on all its outstanding stock and the interest and principal of its bonds and generally of all other expenses, its power to issue either stock or bonds, being then settled and fixed at the gross sum of \$18,925,000. The lease is replete with provisions having in view the payment of this 10 per cent. net upon the stock as the one controlling

idea and consideration to the lessor in the making of the lease.

The substance of the lease, lying at the foundation of this action, is that the Brooklyn City Railroad Company demised to the Brooklyn Heights Railroad Company all its properties for 999 years for a rental to consist of 10 per cent. *net* upon its capital stock and the interest upon its bonds annually. In addition to the stock and bonds then outstanding, \$3,000,000 in stock and \$3,000,000 in bonds were to be issued, the proceeds of which were to go to the completion of the work of transforming the road from horse to electric power which, at the time, was in process of accomplishment. The wit of man is exhausted to provide in this lease that all possible charges, indebtedness and expenses thereafter accruing against the lessor shall be met by the lessee. The cost of maintaining the lessor's corporate existence, its expense in litigation, everything in the future from the largest to the smallest item, is to be borne by the lessee. The first proposition to lease at 8 per cent., with a security fund of \$2,000,000, was rejected, and the second proposition to lease at 10 per cent., with a guaranty fund of \$4,000,000 was accepted. So that in any possible happening or contingency, the stockholders and bondholders of the lessor should be absolutely certain of receiving the rental, to wit: 10 per centum *net* upon their stock and fixed interest and principal of their bonds, *net*, and without diminution from any cause. This consideration was of course controlling with the stockholders when they voted for the lease, and, as it is conceded that the amount of stock and bonds, called for by the lease, have been issued and applied to the work for which they were designed, it is obvious that the plaintiff cannot recover against the defendant.



It appears that on February 15, 1893, this lease, the terms of which had been for some time under consideration between the contracting parties, which had been duly approved by the directors and voted for by nearly all the stockholders, was fully executed and perfected by both corporations.

(Minutes, vol. 8, pp. 7226-7227.)

Delay ensued in the transfer of possession from an injunction against the consummation of the transaction, from the need of time by the lessee for putting up \$4,000,000 as collateral security and other untoward circumstances. The practical work of conversion required instant and continuous attention as matter of benefit to both corporations, and of the convenience of the travelling public. Under these circumstances, at the request and in behalf of the lessee, the work of conversion was continued by the lessor up to June 6, 1893, when the lessee entered into possession, during which interval about \$2,000,000 of the \$6,000,000 above mentioned had been provided and expended upon such work by the lessor. And, thereafter, \$4,000,000 of such \$6,000,000 was expended upon such work conducted by the lessee.

The lessee now claims that the \$2,000,000 expended *ad interim* must be charged against the stockholders and bondholders of the corporation lessor, and collected by some inconceivable process from some indiscernible person or persons irrespective of the rental of 10 per cent. net and interest on the bonds; or that \$2,000,000 more in stocks and bonds be issued by the lessor and applied to the lessee's expenditures without regard to their redeemability. It is respectfully submitted that such a claim is absurd upon its face. It is nearly, but not quite, as absurd as the suggestion of fact that the lessor proceeded with the expenditure of

\$2,000,000 for betterment of the premises after they had been fully demised without any accountability therefor on the part of the lessee.

If a continuation of this work between February 14, 1893, and June 6, 1893, would by the terms of the lease, entail the expense thereof, upon the lessor, leaving it, notwithstanding, under a fixed obligation to advance \$6,000,000 after June 6, 1893, to the work of construction, then the lessor would have been obliged to suspend all work during this important interval and at its end give the lessee possession of a railroad in a crippled and disabled condition in order to have on hand for the lessee the \$6,000,000 to go to the completion of the road after June 6, 1893. The lamentable character of such a situation is fitly forecasted and described in several of the circulars and other documents prepared by the lessee.

February is in the winter, and in winter there is no great travel toward the sea. In July begins the great and multitudinous travel through Brooklyn to Coney Island and back. And it would be intolerable to construe this lease so as to suspend the work of conversion for four months and operate crippled and disabled roads with small revenues, when prompt action would rapidly transform them into electric tramways with enormous business and proportionate revenues.

That the lessee was fully apprised of the enormous advantage to accrue to it from a rapid completion of the work of conversion, is obvious from the circular issued by H. B. Hollins & Company on July 1, 1893, known as Defendant's Exhibit 54, (Min., Vol. 6, p. 3246), in which it is said :

"Until recently the Company (B. C. Co.), has operated 176 miles of road, by horse power, but

“ the entire system (with the exception of the  
 “ Brooklyn Heights Cable R. R.), is rapidly being  
 “ converted to electric power. While in several  
 “ instances where the change has been made along  
 “ the line from horse to electric power the gross  
 “ earnings have increased 60 per cent. to 80 per  
 “ cent., the following figures based upon actual re-  
 “ sults obtained in other cities by substitution of  
 “ electric power, we believe is a conservative esti-  
 “ mate of earnings.

\* \* \* \*

#### “ EARNINGS.

“ Actual gross earnings of the Brooklyn “ City R. R., for the year ending “ June 30th, 1892 (while operating by “ horse power, only 176 miles of “ road).....	\$3,787,000
“ Estimated increase under electricity “ 25 per cent.....	946,750
“ Natural increase for year (based upon “ previous years).....	276,000
“ Total gross earnings.....	\$5,009,750
“ Estimated operating expenses, in- “ cluding taxes (60 per cent. operated “ by electricity against 81 per cent. “ with horses).....	3,005,850
“ Net earnings.....	\$2,003,900”

With this enormous advantage to the lessee and, at least, no possible gain to the lessor, is it for a moment, to be supposed that this lease was drawn to postpone the work of conversion from horse to electricity for four months, unless the lessor should be guilty of the monstrous folly and still more monstrous wrong of doing it in the interval at its own expense ?

There is no condition precedent to the doing of the work of conversion under the lease, either expressed or inferable from its terms, as to time, condition or otherwise except that it shall be at the request of the lessee. As to all the moneys to be provided by the lessor, and especially as to the proceeds of the sale of \$3,000,000 of stocks and \$3,000,000 of bonds, to be issued, which are the subject of plaintiff's contention in this action, §V of the lease provides: "The lessor further covenants and agrees to issue three million dollars (\$3,000,000) of its capital stock now unissued, but authorized to be issued, within six months after the delivery of this lease, and to sell and dispose of the same at par, and also to issue three million dollars (\$3,000,000) of its bonds, now unissued, but authorized to be issued, which said bonds shall be issued from time to time, as requested by said lessee, and shall be sold or disposed of for the highest price bid or offered therefor, and the proceeds of said stock and bonds, less any premium realized or received on the sale of the said bonds, shall be expended by the lessor in payment, at the request of the lessee, from time to time of the cost of converting the railroads of the lessor into an electric railroad \* \* \* and it is agreed that all the expenses incident to the issue, sale and disposition of said stock and bonds shall be borne and paid by said lessee."

It has already been shown by the testimony of Messrs. Burke, Hollins, Lewis and Auerbach that the continuance of the work of conversion prior to June 6, 1893, was ratified and approved, as will hereafter be seen, by the plaintiff itself, that this conditional request was fully made by the lessee, and that the work was done and the expenditure

made thereunder between February 14, 1893, and June 6, 1893.

Obviously, therefore, the plaintiff's claim in this action has no possible foothold in any of the provisions of the lease. Ordinarily, it would require only the slightest atom of proof to show that work, done in betterment of an estate after it had been demised under a lease for 999 years, was done at the expense of the lessee. But in this case the fact has been proven by super-abundant and conclusive evidence.

**Such is the lawful and approved method of construction.**

"It is a rule that the whole contract should be considered in determining the meaning of any or of all its parts."

2 Parsons' Contract, 8th Ed., pp. 619-621  
\*pp. 501-504 and note *u*.

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument, may be collected *ex antecedentibus et consequentibus*, every part of it may brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done."

Per Lord Ellenborough, in *Barton v. Fitzgerald*, 15 East, 541.

"The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual."

2 Kent's Com., \*p. 555.  
*Ripley v. Larmouth*, 56 Barb., 21.

## POINT THIRD.

**What was actually done and by whom, and for whom it was done and what was actually expended and against whom it was chargeable and against whom it was charged in the course of the work of conversion, was thereafter fully investigated, examined and decided by all the parties in interest and by such parties ratified and approved; and an accord and satisfaction was thus fully had in the year 1894.**

Happily, for the defendant all the living witnesses are in accord upon the facts in support of this point and the documentary evidence is comprehensive and conclusive.

Mr. Alfred A. Noble, the chief bookkeeper and accountant of the plaintiff and its principal witness in these particulars gave utterance upon cross-examination to the following facts, quite disconcerting to the attorneys for the plaintiff:

By Mr. De Witt :

Q. Have you not repeatedly said that all these accounts were thoroughly threshed out before the final adjustment in August, 1894 ? A. Yes.

Q. Between the two companies ? A. Yes.

Q. That statement by you is true ? A. Yes.

(Minutes, vol. 5, pp. 2338, 2339.)

By Mr. Severance :

Q. Do you remember of an examination of the disbursements made by a certain Mr. Phelps ? A. Yes.



Q. This examination by Mr. Phelps included the examination of the books of the Brooklyn City Company, did it not? A. To the best of my knowledge, yes.

Q. You have seen this report, have you not? A. I have seen one of his reports.

(Report marked plaintiff's exhibit 1440.)

Q. I show you plaintiff's exhibit 1440, will you state whether that is the report of Mr. Phelps to which you have referred? A. I believe that is the report, yes.

Q. When you spoke of the accounts being threshed out did you have in mind also the examination of accounts made by Mr. Phelps? A. Yes.

Q. Embodied in this report? A. Yes.

(Detailed statement accompanying Ex. 1440, marked 1440a.)

(Minutes, vol. 5, p. 2419.)

By Mr. De Witt:

Q. How came they (Heights and Traction Companies) to apply for the loan of money? A. They needed money to pay their obligations.

Q. Were these accounts for the purpose of showing that their funds in money had been exhausted? A. Yes.

Q. Was report to that effect made to the N. Y. Guaranty and Indemnity Company?

Mr. Severance: I object to it as incompetent. The report must necessarily be in writing and if there is any report other than the one here it should be produced.

Q. In connection with the making of that loan from whomsoever it came, had not all these accounts been thoroughly investigated and settled

between the two companies? A. That is my understanding of the case; yes, sir.

Q. Was there any document prepared and signed by both companies in evidence of that fact? A. The tripartite agreement.

Q. And the tripartite agreement arose out of this settlement of accounts?

Mr. Wells: I object to that as calling for his conclusion.

A. That was my understanding of the case.

Mr. Wells: I object to the understanding.

Q. Who made the further loan of moneys needed by the Traction Company for the completion of the line? A. It was obtained by the sale of collateral trust notes.

Q. Whose collateral trust notes? A. Brooklyn Heights Railroad Company and Long Island Traction Company.

Q. Had the Brooklyn City Railroad Company no connection with those notes? A. They were a party to it—yes.

Q. Who advanced the money vouched for by these notes? A. The New York Guaranty and Indemnity Company.

Q. Had the Brooklyn City Railroad Company any connection with these notes? A. Yes.

Q. What was it? A. As endorsers of the notes, I believe.

By Mr. Trull:

Q. The New York Guaranty and Indemnity Company, this report of Mr. Phelps was made to it, I understand. A. Yes.

Q. It was made to it, was it not, and it subsequently became the trustee under the mortgage given for collateral trust notes? A. Yes.

Q. When the tripartite agreement came to be made in 1894, notes of the Brooklyn Heights Railroad Company and the Long Island Traction Company were given to the Brooklyn City Railroad Company, were they not? A. Yes.

Q. One for \$347,036.44 and another for \$308,000, or thereabouts—is that so? A. Yes.

Q. As collateral security for those notes certain of the collateral trust notes of the Heights and Traction Company were given—is that so? A. Yes.

Q. And those collateral trust notes were the ones secured by this mortgage to the Guaranty Trust Company? A. Yes.

Q. Now, in the general threshing out of accounts in the account between the Heights and the City companies, to which you have referred, just previous to the 17th of August, 1894, the date of the tripartite agreement, these amounts for which the Heights Company and the Traction Company were to give their notes to the Brooklyn City were contained in the account, were they not? A. Yes.

Q. And the notes were given for those amounts? A. Yes.

By Mr. Dewitt:

Q. How were they ascertained, practically? A. By the examination of the accounts.

Q. In both companies? A. Yes.

Q. And that was found to be the balance due? A. That is my understanding of the case—that at the time of the tripartite agreement the note for \$308,000 was given to the Brooklyn City to adjust their surplus at the time the companies came to an agreement.

Q. You were at work in connection with that business for some time? A. Yes.

By Mr. Trull:

Q. Was Mr. Bogardus with you? A. Yes.

Q. And Mr. Swin representing the Company?

A. Yes.

Q. And you knew there were committees appointed who had this matter under consideration?

A. I think so.

Mr. Severance: I move to strike out that answer.

Q. Mr. Legget and Mr. Merritt, do you remember them? A. I remember them.

Mr. Trull: I offer in evidence, in connection with the examination of this witness the tripartite agreement.

(Received and marked defendant's exhibit 50.)

(Minutes, vol. 5, pp. 2422-2426.)

By Mr. Wells:

Q. Did you personally make an examination of the accounts and books of the Brooklyn City Railroad Company in order to determine what their surplus was? A. I checked over items in connection with the amount of surplus when the statement prepared showed \$308,000.

Q. Who prepared that statement? A. Mr. Swin.

Q. In what shape was that statement? A. It was prepared on a yellow sheet.

(Minutes, vol. 5, pp. 2428, 2429, for Yellow Sheet, see vol. 6, p. 3452.)

Q. When you say that it is your understanding that \$308,000 and this \$350,000 was arrived at between the two companies; how do you mean it was reached, between what officers of the companies?

A. Between the proper officers of the companies.

Q. Who were they? A. All the officers of the company who were interested in it.

Q. Can you name any of the officers who knew of the details of that adjustment? A. Mr. Lewis certainly knew of it.

Q. Did you know that any detailed statement was ever submitted to him which would show those results? A. Yes, and I believe that Mr. Lewis had seen that yellow sheet.

(Minutes, vol. 5, p. 2432).

Q. Is it not a fact that the figures in the tripartite agreement were reached by Mr. Bogardus, Mr. Lewis and Mr. Swin? A. And verified by Mr. Phelps.

Q. Mr. Phelps's report does not show any such figures as are contained in the tripartite agreement, does it? A. It shows the requirements and specifies the disbursements up to a certain time.

(Minutes, vol. 5, p. 2434).

By Mr. Severance :

Q. Mr. Noble, in answer to Mr. Trull, a moment ago, you stated this settlement, as he called it, was submitted, undoubtedly, to the Board of Directors, you meant by that the tripartite agreement was submitted to the Board? A. Yes.

Q. And you assume that to be a fact from the paper itself? A. Yes, also from the entry relating to the Brooklyn City surplus shown by the entry prepared by Mr. Bogardus.

By Mr. DeWitt :

Q. The entry where? A. On the Brooklyn Heights' books.

By Mr. Severance :

Q. All the entries upon the Brooklyn Heights' books in relation to that matter were made originally by Mr. Bogardus? A. Yes.

Q. He took the responsibility of everything himself? A. I don't think so.

Q. He did so far as you are concerned; you did not make any entries? A. No; I did not make any entries.

By Mr. Wells:

Q. Did you know anything about the Brooklyn City refusing to pay any more money on account of construction and conversion in March, 1894, at the time of the third account? A. I do not know of any refusal.

By Mr. DeWitt:

When Mr. Severance asked you a question in which he said that Mr. Bogardus took the responsibility alone, you stated you did not think so, what did you mean by that? A. I meant Mr. Bogardus would not assume any responsibility for which he did not have any authority.

Mr. Severance: I move to strike out Mr. Noble's answer as a conclusion.

Q. Mr. Bogardus is dead? A. Yes.

Q. You knew him well? A. I certainly did, yes.

(Minutes, vol. 5, pp. 2440, 2441).

After the putting in of this testimony, Mr. Noble did not again appear in the case and was not thereafter used as a witness by the plaintiff.

DANIEL F. LEWIS, called in behalf of the defendant, testified as follows:

By Mr. De Witt:

Q. When was it that, so far as you understand the matter, the funds provided under the lease by the City Railroad Company for the work of conversion became exhausted?

Mr. Severance: Object to that as calling for the conclusion of the witness.



By the Referee:

Q. Do you know when the funds of the City Company were exhausted? A. Generally, yes; I think it was in the spring of—

Mr. Severance: Just a moment; he didn't ask you to state when.

By Mr. De Witt:

Q. Do you know when they were exhausted? A. Not without records to give you the exact date; it was in the spring in 1894.

Mr. Severance: Does your Honor rule on my objection, please?

The Referee: I overrule the objection.

Mr. Severance: I move to strike out the answer.

(Motion denied. Exception.)

(Minutes, vol. 6, pp. 3273-3274).

To the best of my recollection that circular is signed by all the directors or officers of the Brooklyn Heights Railroad Company, the plaintiff, and the Long Island Traction Company. (Received as defendant's exhibit 55; Minutes, vol. 6, pp. 3274-3286.)

(This circular, under the date September 15, 1894, recites the exhaustion of all the funds provided under the lease for the work of conversion and the need for moneys to meet the indebtedness of the Brooklyn Heights Company, caused largely by the expensiveness of the electrical equipment or conversion, declares that the figures therein given were found correct by Charles D. Phelps, an accountant selected at the request of the Directors by the Trustee for the holders of Collateral Trust Notes below mentioned, the New York Guaranty & Indemnity

Company, and calls on the stockholders to subscribe for the Collateral Trust Notes wherewith to meet such indebtedness.)

MR. LEWIS again testifies:

Prior to the date of this circular we had many meetings with the officers and agents of the three companies, namely, the Brooklyn City Railroad Company, the Brooklyn Heights Railroad Company, and the Long Island Traction Company, in reference to the condition of our accounts.

(Minutes, vol. 6, p. 3286.)

*Direct-examination* by Mr. De Witt: Q. I call your attention to an extract from the minutes of the Brooklyn Heights Company already in evidence, page 4180, March 6, 1894; "The General Manager stated in a general way that it would require additional funds over and above the amount to be received from the Brooklyn City Railroad Company to complete the work of conversion." On March 20, 1894, Minutes of the Heights Company, Page 3181; "The General Manager stated that the company would require within a short time additional funds to pay on account of construction, etc., that the Brooklyn City funds for that purpose were about exhausted." And April 17, 1894, Page 3183: "The General Manager presented his report of the balances, due on contracts for the reconstruction of the lines of the Brooklyn City Railroad Company. Matter of providing necessary funds discussed." Do you recall those meetings and those occurrences? A. Very distinctly. I was president of the Brooklyn City up to February, 1894, and as such was familiar with the work of conversion as it progressed from time to time and kept myself informed from

time to time as to the expenditures on that work. I was elected president of the Brooklyn Heights Company on February 7, 1894, and resigned on June 21, 1895, to take effect July 4, 1895. I was elected president of the Long Island Traction Company on March 27, 1894, I don't recall the date exactly, and resigned June 21, 1895, to take effect June 30, 1895.

Q. So that your presidency either of the one company or of the other I think ran parallel and continuous to the end of the work of conversion, didn't it? A. I don't think it was entirely completed, it may possibly have been, although I think there was some work at different places, in car barns and power stations which were not fully completed, but very largely so. (Minutes, vol. 6, pp. 3287-3289.)

I recollect that Mr. W. A. H. Bogardus went into the Heights Company as Secretary and Treasurer about June 15, 1893, and his services covered very largely the period during which the work of conversion of the road from horse to electricity was completed; as Treasurer of these companies Mr. Bogardus was very familiar with their accounts.

I knew Mr. Thomas P. Swin very well. He became the Secretary and Treasurer of the Brooklyn City Railroad Company about March 8, 1894, and had been acting in many capacities for it for many years. He kept the books of the Brooklyn City, under the supervision of Mr. Bogardus, until he was elected Secretary and Treasurer, then he had charge of them himself as I recollect.

Mr. Noble was the head bookkeeper of the Heights Company under the supervision of Mr. Bogardus.

I remember very distinctly those meetings in references to which you have read excerpts from the Minutes, where the General Manager reported that the funds of the City Railroad Company were about exhausted. I gave that subject consideration in

connection with the members of the executive committee and with Mr. Bogardus. I recall it more particularly because I had just recovered from a serious illness; I had been South for about—from the beginning of my sickness until my return here about two months from December 8th and, after I returned from the South, perhaps the 7th or 10th of February, Mr. Bogardus immediately told me of this situation; then followed these formal meetings, which we had, or discussions on this subject, as you have recited them. I remember, generally the substance of the discussions—that the funds of the Brooklyn City Company were about exhausted, and that some steps would have to be taken to provide sufficient funds to continue the work. I caused an examination of our books to be made by Mr. Bogardus to ascertain the truth of the General Manager's report. Mr. Swin, I think, figured in the examination at that time but I saw more of Mr. Bogardus, however, than of Mr. Swin.

As far as was permitted me to do at that time I looked into the matter sufficient to satisfy me of the correctness of these things as they proceeded. The books of the Brooklyn City Company were examined by Mr. Swin and Mr. Bogardus jointly to ascertain the verity of the report made in respect to the exhaustion of the funds to come from the Brooklyn City Company. The books of the Brooklyn Heights Company were examined on this point, by Mr. Bogardus and Mr. Noble. These gentlemen made a statement and reported the condition of the account. (Minutes, vol. 6, pp. 3290-3294.)

The Referee: Are there any minutes of the meeting of a joint committee?

Mr. Wells: We haven't been able to find any such minutes.

The Referee: Then I suppose they can give oral evidence.

Mr. Wells: There is no authorization for any such meeting, no reference to it anywhere.

Mr. De Witt: (Reading) "It was decided that the president confer with the vice-president of the Brooklyn City Railroad Company with a view to holding a joint meeting of the executive committee of both companies, and with a view of formulating some suitable plan covering the requirements." That is the minute, and it is signed by Mr. Lewis as your Secretary.

The members of the executive committee at that time of the two companies, but precisely who were present at that meeting of the joint committee, I don't know that I can answer correctly; to the best of my recollection—Mr. Crowell Hadden, Mr. Legget, Mr. Merritt, Mr. White—there were about ten at that meeting representing the two companies.

Q. What was the subject under consideration before that joint committee?

Mr. Severance: Objected to as incompetent, immaterial and not the best evidence.

Objection overruled. Exception.

A. To the best of my recollection, I stated to the joint committee that the Brooklyn Heights would require additional funds to carry on the work of conversion and construction, and I very strongly recommended in a speech which consumed three-quarters of an hour, the issue of additional bonds by the Brooklyn City to the extent of six millions, those bonds to be treated precisely the same as the other bonds recited and referred to in the lease; that was presented from every point of view at that time, and the committee adjourned, to be

taken up by the Brooklyn City Company, because I asked the Brooklyn City to aid us, if not in that particular direction, some other that might be a good substitute." The outcome of that meeting was a report made by Mr. Legget and it resulted in the suggestion of this temporary arrangement, which was afterwards known as the collateral trust notes, running for one or three years, redeemable at one year at the option of our company. I mean generally the plan portrayed in what is known as the tripartite agreement. (Minutes, vol. 6, pp. 3294-3298.)

Many meetings of the officers and directors of these two companies were held preceding the tripartite agreement during the summer of 1894 at 168 Montague Street, at the New York Guaranty and Indemnity Company, at the offices of Davies, Stone and Auerbach and at the Lawyers' Club. I don't recollect any minutes made at those meetings.

Q. Were the accounts examined as you have testified by Bogardus, Swin and Noble stated at those meetings and considered at those meetings?

Mr. Wells: Objected to as immaterial and irrelevant. It does not appear that any person was present at any of these meetings who could bind either of these two companies by any action taken. It does not appear what these statements were except that it appears that one statement was in writing. We object to any conversations between individuals not named.

The Referee: I will take this. The next question that follows may be objectionable. Exception.

A. They were and particularly at the meetings I attended.

Q. In answer to the question alluded to you said at our last meeting that you had many meetings



with the officers and agents of these companies, namely, the Brooklyn City Railroad Company, the Brooklyn Heights Railroad Company and the Long Island Traction Company. Mr. Wells seems to think they were not officially represented. I will ask you who attended in behalf of each of those companies? A. Mr. Legget, Mr. Merritt, Mr. Bliss——

Q. One moment. Mr. Merritt and Mr. Legget were the president and I think vice-president of the Brooklyn City Railroad Company, are they not, or were at this time? A. Mr. Merritt was president, but I don't recollect whether Mr. Legget was vice-president at that time or not. He was a director of the Brooklyn City Railroad Company at that time.

(Minutes, vol. 6, pp. 3299-3301.)

Mr. White was there at various times.

By the Referee:

Q. Whom did he represent? A. He was in the Brooklyn City Company.

By Mr. De Witt:

Q. He was vice-president—he is now anyway? A. I don't know but he was then, he was vice-president under my administration for the Brooklyn City. Mr. Legget was chairman for the disbursing committee of the tripartite agreement. Mr. Bliss I think I mentioned and Mr. Campbell.

By the Referee:

Q. Can you tell by looking at the list the directors of the respective companies? A. Probably.

The Referee: Look at the list and see if you can tell from looking at the list? A. I will read from the Brooklyn Heights first.

By Mr. De Witt:

Q. Mr. Bliss is dead, isn't he? A. Yes, sir; Mr. Campbell too. I will read first from the Brooklyn Heights. I will take them in order. Myself, Mr. Bliss, Mr. Bogardus, Mr. Campbell; and from the Brooklyn City, Mr. Merritt, Mr. White, there is an officer here, Mr. Swin, whom I saw, and who met there—on those occasions, Mr. Legget——

Q. Mr. Swin was what? A. Secretary or treasurer of the Brooklyn City Railroad Company at the time we are talking about.

Q. And was Mr. Bogardus there? A. Yes, sir. The same parties I have referred to in the Brooklyn Heights represented the Long Island Traction Company; they were identical at that time. I occupied the same office in the Traction Company; I was president of the Traction Company, and the others were either directors or what I have stated in respect to the Brooklyn Heights Company. These gentlemen met very often on this subject of the condition of the accounts and the necessities of the company's finance in the future; I couldn't say how many times a week but we had very numerous meetings.

(Minutes, vol. 6, pp. 3302-3304.)

The Referee: You can go back to your old question. You asked him whether the condition of these accounts was stated there and was discussed by these men.

By Mr. De Witt:

Q. Were those accounts stated in your meetings and discussed by you? A. Yes, sir.

By the Referee:

Q. Was there a written statement presented? A. Yes, from time to time. I have not any of those

statements and I do not know what became of them.

Q. Are those accountants who made those examinations living? A. Mr. Noble is living.

By Mr. De Witt:

Q. Do you know what became of those statements?

The Witness: I think I can help you out by saying what the practical situation was.

The Referee: I think there will be no objection to that if you don't state what the figures were.

A. The practical situation is this: These two companies were delegated to examine the accounts for the purpose of determining what our situations were and from time to time, every day, sometimes twice a day, they would come to my office and show me as the account proceeded how things were and ask questions, which were answered by me, and finally it resulted in an action, which I think is of record, must be, the tripartite agreement, and I don't know whether any minutes were taken prior to the last meeting at the office of Davies, Stone and Auerbach and then adjourning to the Lawyers' Club, the day we finished it, or not, but if there are any, there are people who can testify to them, and that cuts a long story, your Honor, down to a fact.

By the Referee:

Q. These meetings that you had, in which you discussed the condition of the two companies, you had as I understand it a written statement showing the figures? A. Yes, made at numerous times from time to time as it progressed.

Q. And those statements, you do not know what became of them? A. I do not sir, I hadn't

charge of them I never have seen and never have been asked about them since.

Q. You discussed these accounts presented by the accountants? A. Certainly.

Q. The condition of the companies? A. Yes.

Q. And what you should do to raise the money? A. Yes.

Q. That these accounts showed was necessary to be raised? A. Yes, sir.

By Mr. De Witt:

The tripartite agreement was the outcome of all those meetings or conventions. By this it appears that our company, the Heights Company, set about and thought to raise about \$3,000,000 in nominal value. The money was actually raised through the issue and sale of the collateral trust notes which were the joint notes of the Brooklyn Heights and Long Island Traction Companies.

(Minutes, vol. 6, pp. 3305-3308.)

By the Referee:

Q. There were \$3,000,000 to be raised under that tripartite agreement? A. Substantially.

Q. And you say that amount of money was raised by the issuing of notes signed by the Brooklyn Heights and the Long Island Traction Company? A. They were provided for, but that much money was not raised.

Q. Now, as to those notes, Mr. De Witt asked you when they were paid? A. I don't know without looking at the minutes and perhaps the proceedings of the different stages of this business.

By Mr. De Witt:

Q. I want to know as a matter of fact, without looking back through these papers, how much money was raised by them after you had concluded the amount you needed and the condition of your

account; how much did you raise and how did you raise it? A. I should have to refer to the records for that, I could give you the sum to the best of my recollection, but it might be erroneous.

Q. That will answer my purpose, give me the best of your recollection? A. To the best of my recollection we raised \$1,500,000 in cash at that time.

By the Referee:

Q. What was the face of the notes on which you raised the \$1,500,000? A. The best of my recollection is \$1,875,000.

By Mr. De Witt:

Q. Out of these moneys were the two notes given by the Heights Company and the Traction Company paid to the Brooklyn City Company? A. Yes, sir. Those two notes were about \$308,000 in one instance and about \$347,000 in another instance.

Q. For what was the \$308,000 note given to the Brooklyn City Company?

Mr. Severance: Objected to, that is already discussed by written instruments in evidence.

Objection overruled. Exception.

A. That \$308,000 note—that is not the exact amount—but that is near enough and that was given to repay the Brooklyn City Company for an amount which they had paid from their surplus account and which amount was in addition to the proceeds of the bonds and stock provided for in the lease. The note of \$347,000 was given to protect the Brooklyn City Company in direct obligations which they were then under by the making of contracts for various materials, &c., and which were

not completed and which were not paid for. The objects for which those two notes were given were discussed and talked about at the various meetings of which I have spoken.

(Minutes, vol. 6, pp. 3309-3312.)

*Cross examination by MR. SEVERANCE.*

I retired from the presidency of the Brooklyn City Company February 21st, 1894, and I was elected president of the Brooklyn Heights February 7th, 1894.

Q. Then for two weeks you were president of both companies. A. Yes, but not in the City I believe; I may have been a few days of that in the City, I don't recollect the exact date, but I testified I thought it was about the middle of February I returned from the South. Mr. Bogardus had been employed by the Brooklyn City Company during my presidency in 1893. He was selected by the executive committee and elected by the Board of Directors. He was recommended originally by the secretary of the E. W. Bliss Company, he was his personal friend, he then waited on me and the executive committee in regular session; we held a conference with him, I then looked up his references and was satisfied with them, and he was regularly nominated for the secretaryship, and I think the treasurership, and elected by the Board of Directors. Perhaps that recommendation was also joined in by the executive committee.

(Minutes, vol. 6, pp. 3320, 3321.)

So far as operating and administration were concerned I continuously did the business myself first of one company and then of the other from the time that I became president of the Brooklyn City Company up to the time that I ceased to be presi-



dent of the Brooklyn Heights Company in 1895. I don't recollect who had charge of the bookkeeping of the Heights Company the 6th of June, 1893, but the general supervision of the Brooklyn Heights was under me. My recollection is that Mr. Bogardus at that time supervised these books, who kept them I don't recollect.

(Minutes, vol. 6, p. 3378.)

Mr. Noble's appointment was submitted to me I think by Mr. Bogardus and Mr. Bogardus recommended his appointment and he was appointed chief accountant under Mr. Bogardus.

(Minutes, vol. 6, p. 3379.)

I don't remember from what books I derived the information in the spring of 1894 that the Brooklyn City funds were exhausted. That the funds of the City Company were exhausted generally, probably, could have been calculated knowing the situation as Mr. Bogardus did at that time, but I haven't any doubt the information came from the Brooklyn City books.

(Minutes, vol. 6, p. 3380.)

I recollect that there was an examination of the accounts between these two companies made by Mr. Phelps for the New York Guaranty and Indemnity Company. I don't remember the date but it was in 1894.

(Minutes, vol. 6, p. 3382. See also letter of Daniel F. Lewis, dated August 23rd, 1897; Minutes, vol. 6, pp. 3391-3393.)

Mr. LEWIS again testifies as follows:

*Direct examination:*

The accounts in respect to conversion between

the Brooklyn Heights, and the Brooklyn City Companies, were adjusted and settled about the time of the issue of the collateral trust notes in August, 1894. The parties to that adjustment were the members of the executive committees of the companies, the Long Island Traction Company, Brooklyn Heights Company and the Brooklyn City Company, and they may have been added to by some of the members of the board too, I think principally the executive committees of the companies, the Long Island Traction Company and the Heights Company, being identical and the Brooklyn City Company being distinctive. That adjustment eventuated into what is known as the tripartite agreement. At these times I was familiar with the accounts and expenditures of both companies. That yellow sheet is a correct transcript of the books of the Brooklyn City Company, that is, the credits and debits are correct transcripts from the books of the Company.

Q. Were any of the sums charged to conversion or construction, and consisting of debts due and payable by the Brooklyn City Railroad Company, of course incurred prior to the date of the lease, or for matters not chargeable to the lessee under the lease, in any way deducted from the six million dollars or the cash on hand coming to the lessee under the lease? A. No, sir, they were not taken from the lessee unless they were received for construction and conversion purposes, the entire proceeds of the six million dollars stock and bonds.

Q. And that is true with respect to the cash on hand at the time the lease went into effect, other than that which was due to the surplus? A. Yes, all went into conversion and construction.

Q. Under the lessee, did it not? A. Under the lessee, in addition to the \$308,000.

Q. When in August, 1894, you as President of

the Brooklyn Heights Company were called upon to approve and sign the document known as the tripartite agreement and the two notes of the Brooklyn Heights Railroad Company and the Long Island Traction Company for \$308,340.35, and \$347,046.44 respectively, had you full knowledge of the origin of the figures in the so called yellow sheet which was made the basis of the two aforesaid notes? A. Yes, sir.

The figures in the yellow sheet were taken from the Brooklyn City Railroad Company's books. Those books were written up during my incumbency as President of the Brooklyn City and familiar to me in their origin, detail and significance. And I was at the time of the tripartite agreement familiar with the correctness, validity and integrity of the figures contained in the yellow sheet which was the basis of the notes given and recited in the tripartite agreement. (Minutes, vol. 8, pp. 7216-7219.)

That yellow sheet, which is defendant's exhibit 56, was prepared by Mr. Bogardus, the secretary and treasurer of the Heights Company and Mr. Thomas P. Swin, the secretary and treasurer of the Brooklyn City Company, (Minutes, vol. 8, p. 7220).

Q. In the accounting between the plaintiff and defendant, between July and August, 1894, in the settlement and adjustment of the accounts between the plaintiff and defendant, which resulted in the tripartite agreement and giving the two notes, one on account of surplus and the other on account of direct obligation, were the accounts of the company relative to the expenditure of the proceeds of the three million of stock and three million of bonds considered? A. They were.

Q. In that account were the moneys spent by the

Brooklyn City Railroad Company on account of conversion between February 14, 1893, and June 6, 1893, considered and included in fixing and determining the amount of the notes to be given by the plaintiff to the defendant? A. They were.

Q. At the date you as President of the Heights Company executed the tripartite agreement, dated August 17, 1894, had the proceeds of the three million of stock and three million of bonds mentioned and referred to in the lease been expended in payment of the cost of electrifying the railroads of the Brooklyn City Railroad Company? A. They had been.

Q. At the date you signed the note mentioned in the tripartite agreement, dated August 17, 1894, for \$308,340.55, being the note on account of surplus, had that amount been expended out of the surplus of the Brooklyn City Railroad Company in payment of the cost of electrifying the railroads of the Brooklyn City Company in addition to the proceeds of the three million of stock and three million of bonds mentioned and referred to in the lease? A. It had. (Minutes, vol. 8, pp. 7285-7287.)

Mr. JOSEPH S. AUERBACH, called in behalf of defendant, testified as follows:

*Direct-examination* by Mr. De Witt:

Coming down to 1894, the period of what is called the tripartite agreement, I recall the conferences had between the members of the several companies, the Brooklyn City, Brooklyn Heights and Traction Companies, in respect to the accounts and for the purpose of raising money to continue the work of conversion. Those meetings were held in my office, Mr. Hollins' office, the Guaranty Company's office, Mr. Cromwell's office, Central Trust

Company's office, Mr. Legget's office, and the Brooklyn City office; there were a good many. All or some of the counsel were present at the various interviews. The counsel were Mr. Trull, some of the members of my present firm, we represented also the Guaranty Company, Mr. Cromwell was present at some of the conferences, Mr. Olcott was present at one or two, Mr. Burke, Mr. Hollins, Mr. Lewis, Mr. Legget had a good deal to do with it, I assume I saw Mr. Legget as frequently as anyone, Mr. David G. Legget. I assume I represented the Long Island Traction Company and the Brooklyn Heights Company.

The subject of these conferences was principally the plight of the Brooklyn Heights Company and the necessity for raising money.

(Minutes, vol. 7, pp. 3496, 3497.)

I recognize the circular, defendant's exhibit 55, of February 5, 1906. (See circular, Minutes, vol. 6, pp. 3275-3286.) I had a very substantial part in its composition, as much to do with the authorship of it as anybody else, perhaps more. It contains the scheme, the plan, for raising money to meet the then present and the future exigencies of the Heights and Traction Companies in constructing that road.

Q. It says here: "Besides disbursing the moneys realized from the sale of the increased capital stock or the consolidated bonds of the Brooklyn City Company the Heights Company has expended out of its own funds the sum of a million dollars, and will be required to expend before the electrical conversion is completed a large additional amount." How was the first fact stated in that paragraph ascertained? A. All the figures that are given there in the circular were the result of an accountant's examination of the books of the two com-

panies. These were reported to the gentlemen in the conference. An accountant was selected, Mr. Phelps, my recollection is.

I don't know that I can reproduce what was said after this lapse of time, but the subject of the discussion was the difficulties in which the Long Island Traction Company and the Brooklyn Heights Company found themselves, and were likely to continue to find themselves for some time to come unless they raised money, and the immediate question was the security to be furnished for an advance of money. A plan was finally evolved, which is set forth in that circular, whereby collateral trust notes were to be given with a designated security.

Nobody in any of these conferences claimed or suggested that the Brooklyn City Company owed any further advances or moneys to this work.

(Minutes, vol. 7, pp. 3498, 3499.)

By Mr. Trull:

Q. Then is it or is it not true that Mr. Phelps was selected as an accountant to examine the books of the Heights Company and report what that amount was that they had advanced out of their own funds? A. Yes, among other things.

Q. During these negotiations—if you will turn to the tripartite agreement, you will find that it provides for the issue of notes by the Heights Company of \$308,000 on account of the surplus of the Brooklyn City Company; do you remember that circumstance? A. Yes, I remember an amount which the Brooklyn City had expended in reconstruction.

Q. And also there was an amount, was there not, amounting to some \$347,000, that the Brooklyn City claimed was due it on its direct obligations?



A. I don't remember the amount; there was such a claim.

Q. The amounts were agreed, were they not, and notes given for the amount? A. Yes.

Q. At a meeting of the Brooklyn Heights Company held August 16th, 1894, a resolution was adopted reading as follows: "Resolved, That the sum of \$250,000, authorized to be borrowed hereunder, shall be used in paying the obligations of the Brooklyn City Railroad Company, payable but not yet discharged by this Company," then follows the form of a note: "The Long Island Traction Company and the Brooklyn Heights Railroad Company jointly and severally promise to pay to the Brooklyn City Railroad Company"—the actual note of which is in evidence. Do you recall those circumstances? A. I don't recall any special amount; I recall the amounts of the obligations that were due or agreed to be due from the Heights Company and the Long Island Traction Company to the Brooklyn City Company, notes were given to repay the indebtedness, and they were finally discharged and the collateral trust notes were issued for the purpose of discharging this indebtedness, and for the purpose of completing their obligations to the Brooklyn City Company under the terms of the lease.

By Mr. De Witt:

Q. After what was said by Mr. Trull and Mr. Severance concerning your answer that Mr. Phelps was deputed to ascertain something in regard to the account of the City Railroad, do you wish to change your testimony in that respect? A. I did not mean to say he went over the accounts of the Brooklyn City Company, generally. He was engaged to state the account between the Brooklyn Heights and the Long Island Traction and the

Brooklyn City; that was my impression; and is still my impression. I think his name was suggested by the Guaranty Company. Those figures were relied upon. Perhaps I did not understand what the inquiry was; I did not mean to say that he had examined the Brooklyn City accounts generally.

(Minutes, vol. 7, pp. 3504-3506.)

*Cross-examination* by MR. SEVERANCE.

There was an amount which we expended over and above what had been realized from the proceeds of stocks and bonds of the Brooklyn City Railroad Company. The impression I now have is that Mr. Phelps was called upon to state the accounts as between the Brooklyn Heights and the Brooklyn City for the purpose of determining what amount of money had been expended by the Brooklyn Heights in reconstruction of the road, for which, on the termination of the lease for any reason, it was to have reimbursement. I don't know the extent to which Mr. Phelps' labors went, but that was one of the main things for which he was engaged and for which he did his work. That amount, together with what other similar amounts might be expended, were to be part of the security for the collateral trust notes. Swin and Bogardus made up certain figures, they were in conference with Mr. Phelps. My information as to the state of these accounts at the time of my assistance in the preparation of the tripartite agreement, was derived from the reports of the parties in interest, and conversations with them; I made no personal examinations of the books.

Q. You stated yesterday that you assumed you were acting for the Brooklyn Heights and the Long Island Traction. Why did you make your answer in that way? A. Because some one in conversa-

tion drew the distinction between the Long Island Traction Company and the Brooklyn Heights. I certainly represented one or both of them. I meant by that I represented both of them. I regarded them as interchangeable.

(Minutes, vol. 7, pp. 3525-3527.)

DAVID G. LEGGET, called in behalf of defendant, testifies as follows :

I have been connected with the Brooklyn City Railroad Company either as stockholder or director since about the year '89 or 1890, I can't tell you exactly. I think I was a director as early as that time and am quite a large stockholder in the company. I think I became a member of the executive committee in the spring of 1894, I can't tell you exactly. I took an active and somewhat controlling part in the meetings and discussions and decisions of the various matters coming up in respect to the settlement of the accounts between the Brooklyn City and the Brooklyn Heights and the Traction Company in 1894. I don't know that I was the author of the plan contained in the tripartite agreement for financing the affairs of the Heights Company in respect to future moneys for use in the conversion of the road, but we did a great deal of work on it and that was the outcome of our work. I was present at a great many meetings that were had in respect to the adjustment of accounts and the matters resulting in the tripartite agreement, representing the Brooklyn City Railroad Company. I never had any official relations with the Brooklyn Heights Company. I first heard of the matters needing the adjustment between the two companies within two hours after I arrived at my home from Europe about the first of May, 1894. This matter came up in the Brook-

lyn City Railroad Company. I had not seen any of the others at that time.

Q. What was done in respect to ascertaining the condition of the finances of the two companies?

A. There were various meetings and I, representing the Brooklyn City, Mr. Auerbach, and some of them, Mr. Davies was present, and Mr. Auerbach was the principal one for the other side, and Mr. Trull, Mr. Lewis was at some of them——

Q. He was president then of the Heights Company? A. Yes, he had gone over during my absence to the other company; and Mr. Bogardus I think was present——

Q. He was then of the Heights Company? A. He was then of the Heights Company; and the accounts were looked over, gone over, so that the financial condition of the companies could be arrived at, and then we had very many meetings indeed to arrive at some plan, which resulted in the tripartite agreement and the issuing of the notes and appointment of the disbursing committee and the various details in the carrying out of their plan.

(Minutes, vol. 6, pp. 3411-3414.)

They were all together at nearly all of the meetings. The statements showing the difference between the companies were asked for, and my recollection is that Mr. Bogardus had his statement, and Mr. Swin was there and then there was also a statement by an expert accountant, by Mr. Phelps I think for the other company, who had gone over these accounts and passed upon those things to find out the accounts between the two companies. This tripartite agreement, after we found out what the needs of the company were financially, was arranged for and carried through. It was not only our own accounts but I think Mr. Phelps was for the Guaranty

Company, he went over the accounts and verified them as I understand. The question as to whether the funds provided for by the lease for the work of conversion were exhausted or not was discussed undoubtedly at these meetings. I can't say by all, I can't tell you at each meeting which people were present but there was hardly a meeting at which I was present but what Mr. Auerbach and Mr. Trull were present, and it was discussed. There never was any difference of opinion or knowledge on that subject expressed by any one. Most of the meetings were held in Davies, Stone and Auerbach's office. The final meeting upon which it was concluded to enter into the tripartite agreement was held in that office. After the meeting we all went to dinner. At that dinner I should think there were about fourteen people at the table, I should think all of that. Mr. Auerbach was there, Mr. Trull was there, I think Mr. Keeney and Mr. Valentine were there. Mr. Keeney was a director in the Brooklyn City Railroad Company and a stock holder and he went over to the other company, the Brooklyn Heights, during my absence abroad.

(Minutes, vol. 6, pp. 3415-3418.)

I think that Mr. Hollins or Mr. Burke was at that dinner too, I don't know which. As to the sums of \$308,000 and \$347,000 provided in the tripartite agreement if you wish I can tell you as I understand it. There was a matter of \$308,000 or in that neighborhood that the Brooklyn City Company had paid in advance or overpaid, and then there was a matter of between \$300,000 and \$400,000 on which the Brooklyn City had obligated that company in the contracts they had made for the conversion or change and the \$300,000 and odd had not been paid by the Brooklyn City yet, but they were liable. Those obliga-

tions on those contracts were made in respect to the work of converting the road from horse to electricity, and the Brooklyn Heights and the Long Island Traction Company gave its notes for those two sums. They made two notes and used the traction notes as collateral. The notes were paid by the Heights Company on their maturity, I think.

(Minutes, vol. 6, pp. 3419, 3420.)

The Brooklyn City in aid of the raising of the money by the sale of the collateral trust notes mentioned in the tripartite agreement agreed and did take the notes for their claim, they took a note for \$308,000 and they took a separate note for this other money which they had to pay upon their obligations, they took two notes, and they received these traction notes as collateral security, I won't be sure at what rate, I think it was sixty-five cents on a dollar, but that makes no difference what it was because they were passed back when the money was paid to them.

(Minutes, vol. 6, pp. 3422, 3423.)

Mr. Hollins according to my recollection was present at some of the meetings and negotiations from which arose the tripartite agreement. So far as I know Mr. Auerbach represented Hollins and Company.

(Minutes, vol. 6, p. 3427.)

*Cross-examination* by Mr. Wells:

Q. You have testified that of the two notes given under the tripartite agreement, one of \$350,000 represented the amount of direct obligations of the Brooklyn City Company? A. Yes.

Q. In taking these notes aggregating \$350,000



as representing the direct obligations of the Brooklyn City Company, did you consider in that connection the fact that under this paragraph of the lease which I have referred to the Brooklyn City had agreed to pay those obligations itself? A. We did, undoubtedly, I think, but we had already paid our obligations, and overpaid them, and they owed us about \$300,000 besides.

Q. So that, in addition to taking a note from the Brooklyn Heights, representing the so-called direct obligations, you had another note representing what you concluded was the overpayment? A. What was ascertained to be the overpayment, yes.

(Minutes, vol. 6, p. 3464.)

Q. At the time you made this so-called adjustment, did you take into account the moneys, credits and securities which the Brooklyn City Railroad Company had on hand on June 6th, 1893? A. I should suppose so, unquestionably; we went over the whole situation, and it was found the condition of the companies, and then I went away in the autumn of 1893, and it was understood before I went, I think, about how much more money we had on hand to pay, and, when I came back in 1894, within two hours of my return, I was notified that by mistake they had overpaid, and then I began to take an active part, not until then. I cannot tell you how they arrived at that amount; I can't tell you the figures; the figures were placed before us, and the accounts were adjusted and presumed to be correct and never questioned by anybody, to my knowledge, on the other side, until this suit was begun; I can't say whether I saw any paper showing the money, credits and securities of the Brooklyn City Company on hand June 6th, 1893, but I have no doubt I have seen a statement showing whatever they may have been, but I

have no recollection of whether there was any single statement showing securities, the whole statements were laid before us, what they included I can't tell you at this late date.

(Minutes, vol. 6, pp. 3466, 3467.)

Q. In making this so called adjustment you took it for granted, didn't you, that the Brooklyn City had a right to retain its entire back surplus? A. I didn't take anything for granted; went over the accounts and figures and ascertained the best way we could, which was agreed upon by both companies; the surplus was fixed, understand. It was our book surplus, or our actual surplus, whichever way you are a mind to term it. My recollection is that this adjustment was paid on the assumption that under the lease the Brooklyn City was entitled to have in cash its entire surplus (Minutes, vol. 6, pp. 3469, 3470). When I say that the Brooklyn City overpaid, I meant we had taken it out of our surplus, paid money that belonged to us, overpaid the amount that was due them (Minutes, vol. 6, p. 3477).

Q. Did anybody keep any record of these meetings where this so-called adjustment was arrived at? A. Not to my knowledge, we had no secretary I think, although I won't be sure. My recollection of it is that we were to get together, and talk the thing over by representatives of the various companies, and, when we could get our minds to agree somewhat, to report what we had done;—we had no power ourselves to consummate anything;—to report it to our companies, to our boards, that is my recollection of it; there was no secretary who kept any minutes of what this one said or that one said, because we went over the whole ground probably twenty times, varying all the time and making different suggestions (Minutes, vol. 6, p. 3482).

EDWARD MERRITT, called in behalf of the defendant, testifies as follows:

Direct examination by Mr. De Witt:

I was first appointed president pro tem. of the Brooklyn City Railroad Company in February, 1894. My presidency began on May 25th, 1894. I think there was money in the treasury of the company at that time. I couldn't give you any idea as to how much.

(Minutes, vol. 6, pp. 3427, 3428.)

It was accumulations over and above expenses and dividends for years, I don't know anything better than that. I never heard that any of it was derived from the sale of bonds and stocks.

By the Referee:

Q. Everything else, had been expended? A. Yes, everything.

By Mr. De Witt:

Q. That is, you mean the moneys derived from the sale of stock and bonds were exhausted? A. Yes.

By the Referee:

Q. Was the question of the exhaustion of these funds, no matter how they had been exhausted, discussed by you? A. Yes, sir.

Q. And what, if any, steps were taken to raise funds? A. We appointed a committee that met with the committee that was appointed by the Heights, and had a number of interviews in reference to the way of their raising money to go on with the work, our fund not only having been exhausted, but an over payment to them had been made of, something like \$300,000.

Q. Were you appointed on the committee for your road? A. Ex officio a member of it, as president of the Company.

By Mr. De Witt:

Astothecommitteemenfrom the Heights Company I recall a great many meetings at which Mr. Lewis was present and did the principal amount of talking. He was the president of the Heights Company and represented it in this committee that was acting jointly with one from our board. Mr. E. W. Bliss was present at a number of meetings; I think he was a member of the Heights directorate and I think at most of those meetings or all of them, they were represented by Mr. Auerbach, of the firm of Davies, Stone and Auerbach, as their counsel, and I had associated with me Mr. White and Mr. Legget was on the committee and Mr. Trull represented us as counsel. That Committee met many, many times in Davies, Stone and Auerbach's office, at one meeting at the Lawyers' Club in New York, and the matter was discussed in all its bearings, and the discussions there led up to the forming of the tripartite agreement and financing the concern by that method.

(Minutes, vol. 6, pp. 3429-3432.)

By the Referee:

Q. Was there anything said on the subject of whether the six millions provided for by the lease had been exhausted?

Mr. Severance: Same objection. Objection overruled. Exception.

A. It was; that was the main subject of discussion. It was claimed by us that it was exhausted, and not disputed by them in any way, shape or manner, that we not only had exhausted the fund provided in the lease by the sale of the stock and bonds, but had overpaid them some \$300,000 about, might have been a few thousand more or less, and it was to my interest in the mat-

ter, and my discussions with them were as to the best way of getting back that money, and during those discussions it became evident that certain contracts with the Brooklyn City for conversion had not yet been paid, perhaps were not yet due, and there was some \$350,000 more for which the Brooklyn City Company was liable, in addition to the \$300,000 that we had advanced, and the discussion was as to the best way of refunding to us the \$300,000 over-advanced and providing for the payment of the contracts for which we were liable when they became due and the work was done. The people there present representing the Heights Company or the Traction Company did not dispute the claims of the City Company.

By the Referee:

Q. Were those means provided for (funds for further work of conversion) in the tripartite agreement? A. Yes, sir, they led up to that. There were a great many other suggestions made.

Q. That was the way you finally adopted? A. Yes.

By Mr. De Witt:

I never had any connection with the Brooklyn Heights Company, nor had Mr. Legget or Mr. White, my associates, any connection with it. Messrs. Lewis, Bliss and Auerbach were present at all these meetings, I think, or practically all of them.

(Minutes, vol. 6, pp. 3432-3435.)

Q. At any or either of these conferences which took place in the late summer of 1894, and which led up to the tripartite agreement, was it ever questioned by any representatives of the Heights Company or anybody else that the proceeds of the

stocks and bonds of the Brooklyn City Railroad Company to be furnished for the work of conversion had been exhausted? A. Never.

(Minutes, vol. 6, pp. 3451, 3452).

It is thus abundantly shown that in the summer of 1894 there were several meetings of all the parties in interest; that the books and accounts of the plaintiff and defendant were thoroughly examined, ascertained and stated at these meetings; that an adjustment of the accounts was then had and said accounts were fully adjusted and an accord and satisfaction of all and every claim by or between the parties was reached, and this accord and satisfaction was made manifest in writing under seal in an instrument called the tripartite agreement (Minutes, vol. 5, p. 2426, defendant's exhibit 50 of October 11, 1904), by virtue of which upwards of one million dollars were raised and furnished through the instrumentality of the New York Guaranty & Indemnity Company, which moneys were given to and accepted by the plaintiff and were by the plaintiff devoted to the completion of the work of construction. This work, by the terms of the lease, was only to be done by the plaintiff when the funds applicable thereto, coming from the defendant under the lease, were wholly exhausted. (Lease, § XXII.)

In acknowledgment of the justness and verity of the accounts, as stated, showing that the defendant had exceeded the amount required by the lease to be advanced by it to the work of construction, the plaintiff then gave its notes, one for \$308,000, for the excess advanced out of the surplus belonging to the defendant, and two, aggregating \$350,000, for bills due and payable from the defendant for work and material furnished by it likewise in ex-



cess of the amount required from it under the lease. These notes were devoted to the purposes for which they were given and, at their maturity, were paid by Flower & Company to it in behalf of the plaintiff.

No accord and satisfaction could be more completely had and executed than this!

In the late opening of the case by Mr. Severance before Judge Herrick, made at a point where the plaintiff's evidence was virtually all in, that learned counsel furnished us with the following somewhat surprising attack upon this accord and satisfaction. Says Mr. Severance:

"A man by the name of Lewis had been the president of the Brooklyn City Company, was the president of the Brooklyn City Company, as your Honor will observe, at the time this lease was signed, Daniel F. Lewis signed it, as president, W. A. H. Bogardus signed it as secretary; they were officers of the defendant corporation. Mr. Nicholas was the president of the Brooklyn Heights Company at that time, representing the syndicate that were financing this enterprise at the time the lease was prepared. A certain Mr. Swin was an officer of the defendant company. In the winter of 1894 practically all of the directors went out, and directors who were largely interested in the Brooklyn City, this defendant company, were installed as directors of the plaintiff corporation. Mr. Lewis resigned his office as president of the Brooklyn City Company and was elected president of the Brooklyn Heights, this plaintiff. Mr. Bogardus likewise was made general manager of the Brooklyn Heights. Mr. Swin, their associate, continued as an officer of the Brooklyn City.

"I should remark in passing that, when Mr.

“Lewis was elected as president of the Brooklyn  
 “Heights, and for long afterwards, and I think still  
 “at this time he was and is a very large stockhold-  
 “er in the Brooklyn City Company, this defendant.  
 “He was by his adverse interest—because he had  
 “only a trifling amount of this Long Island Trac-  
 “tion stock—by reason of his adverse interest ab-  
 “solutely disqualified at the election of this plain-  
 “tiff to bind it to anything. Mr. Bogardus was  
 “also largely interested in the Brooklyn City Com-  
 “pany and had practically no interest in the Brook-  
 “lyn Heights. Those two men were the men that  
 “were put in charge of the affairs of the plaintiff  
 “corporation. Of the Board of Directors of the  
 “plaintiff corporation all but two or three in the  
 “summer of 1894 were large stockholders in the  
 “defendant, and had only trifling interests in the  
 “plaintiff. There were, I think, only two direc-  
 “tors—that is all in evidence—only two directors  
 “who were not adversely interested in this way.”  
 (Minutes, vol. 5, pp. 2632, 2633.)

A few incidental errors in this statement should be noticed before taking up its main substance.

Mr. Nicholas, as president of the Brooklyn Heights Company, was a mere dummy of the syndicate at the time the lease was prepared. Mr. Auerbach and Hollins & Company were or represented the syndicate at the time of the preparation of the lease. The defendants and officers of the defendant who went over to the plaintiff company did not make this transfer in the winter of 1894 but, as subsequently stated by Mr. Severance in contradiction of himself (Minutes, vol. 5, p. 2633), took office in the Heights Company as early as the spring of 1894. Instead of only two directors of the plaintiff company, who held no stock in the Brooklyn City Railroad Company, there were four

of these directors who held no stock whatever in the Brooklyn City Railroad Company.

As to the main substance of Mr. Severance's aspersions to the effect that the directors in the Heights Company were disqualified from serving in that capacity by reason of a preponderating influence, arising from a larger ownership of stock in the Brooklyn City Railroad Company, it is easy to expose its hollowness and folly. None of the officers or directors in the plaintiff company in August, 1894, were either officers or directors of the Brooklyn City Railroad Company; and, whatever may have been their former relation to the Brooklyn City Company, it is not at all surprising that they had gone over to the Heights Company since, by the terms submitted to the stockholders, the stockholders of the Brooklyn City Company were accorded the privilege of subscribing to \$27,000,000 of the stock of the Long Island Traction Company at the low price of fifteen per cent.; and they had quite uniformly availed themselves of that privilege. The Traction Company was the owner of all the stock of the Brooklyn Heights Company, the plaintiff, and it was not unnatural that these directors should have followed their larger interests. It is not the case of common directors. The defamatory insinuation is that these directors were under a preponderating influence arising from their holding stock in the Brooklyn City Company, which, as will be seen, is utterly untrue. The following table gives the names of the officers and directors of the Brooklyn Heights Company, the plaintiff, with the par value of the stock held by them in each of the two companies:

DIRECTORS OF BROOKLYN HEIGHTS AND LONG  
ISLAND TRACTION COMPANIES, AUG. 17, 1894.

NAME.	Holdings in B. C. R. R. Co Par.	Holdings in L. I. Traction Co., Par.
Felix Campbell . . . . .	\$45,600	\$320,000
Wm. Marshall . . . . .	72,000	225,000
D. F. Lewis . . . . .	135,000	299,000
W. A. H. Bogardus . . . . .	660	1,000
E. W. Bliss . . . . .	40,000	70,000
C. Hadden . . . . .	40,140	110,000
S. B. Dutcher . . . . .	1,330	27,000
D. H. Valentine . . . . .	40,000	20,000
S. L. Keeney . . . . .	80,000	200,000
John G. Jenkins . . . . .	None	30,000
John Englis . . . . .	None	30,000
Chas. T. Young . . . . .	None	5,000
Theo. F. Jackson . . . . .	None	10,000
Total Par Value . . . . .	\$454,730	\$1,347,000

(Minutes, vol. 8, p. 7259; vol. 5, pp. 2573,  
2574, 2588.)

In the aggregate, at par value, it will be seen that they had \$872,270 more interest in the Traction Company than they had in the Brooklyn City Rail-

road Company; and, upon a like basis, each one of them, with one exception, had far more par value in the Long Island Traction Company than he had in the Brooklyn City Company. Of course, Brooklyn City stock was worth more than its par value, while the Traction stock, for only a short period of time, exceeded par value on the market, and was originally had by the subscribers at the figure of fifteen per centum.

This fact, however, instead of countenancing the aspersions of Mr. Severance, gives to those aspersions the flattest possible contradiction. As early as June 6, 1893, the capital stock of the Brooklyn City Company had become a guaranteed ten per cent. stock;—the stock guaranteed to earn ten per cent. by all the vast properties of the leased railroads and by a deposit of \$4,000,000, as guaranty for the perpetual payment of this ten per cent. It was then, as it is now, what is called on the market, a guaranteed ten per cent. stock. It had, therefore, a fixed value according to the well settled rules of the stock market and this value, under the rules of the stock market, could, in no substantial particular, be enhanced or depreciated. Of course, any such extraordinary happening as the forfeiture of the lease, the occurrence of a financial panic, or the institution of such an incredible action as is now pending before the Referee, might change or vary the marketable rates of such a guaranteed ten per cent. stock, but in the ordinary and current affairs of men it is susceptible of no change.

The perversion of funds, such as is asserted by the plaintiff but entirely disproved in the evidence, might increase the assets of the company issuing the guaranteed stock and in that way enure to the benefit of its stockholders. But such an amount would be wholly inconsiderable with what was to be

gained by a contrary course on the part of directors bad enough to make such a perversion.

These directors could only be benefitted to the extent of their share of such an accretion which would be the proportion thereof going to \$454,730 of the Brooklyn City Railroad stock out of the whole capital stock amounting to \$12,000,000, a matter of about 3 3-4 per cent. of such accretion; whereas the amount diverted from themselves would be according to the proportion which \$1,347,000 bears to \$30,000,000, a matter of about 4 1-2 per cent. So that, on the calculation most favorable to the plaintiff's view, they would be downright losers by ¶their criminality. But these directors of the plaintiff got their stock in the Traction Company at the low price of fifteen per cent. which made the total \$30,000,000 thereof, cost together with the \$3,000,000 that went to the promoters, \$4,500,000. And, when this fact is considered, the whole of the theory at the bottom of Mr. Severance's aspersions vanishes into thin air.

If we take the sum of \$2,000,000, which is the utmost limit of the plaintiff's Munchausen claim, as the amount diverted, then these directors, at a loss to themselves, wrongfully diverted nearly fifty per cent. of the cost price of their individual stock. Naturally, there was an overwhelming preponderance of interest on the part of these directors in favor of increasing the value of the stock of the Traction Company, bought by them at fifteen per cent. If it could be sent to par, there would be a gain of eighty-five per cent. upon their larger holdings of that stock; and this would render their share in the alleged unearned and fraudulent increment accruing to the Brooklyn City Railroad Company, if it should ever be distributed among the stockholders, paltry and inconsiderable.



The same striking preponderance of interest for a rightful discharge of their duty, shown mathematically, appears abundantly in evidence. At the time under consideration in August, 1894, these directors of the Brooklyn Heights Company found their company in a state of absolute bankruptcy, owing about \$700,000 to the Brooklyn City Company and needing upwards of \$1,000,000 for the completion of the work of conversion (See circulars, signed L. I. Traction Co. directors. Minutes, vol. 6, pp. 3275, 3286.) Surely at this crisis, their stock must have been valueless! If, at that time, they had had \$2,000,000 in their treasury and so able to complete their road and still have a surplus, what then would have been the value of their stock?

Counsel for the defendant wish to treat their adversaries with courtesy and respect but it is difficult to retain such sentiments in the face of accusations as baseless as the one we are examining. To predicate, upon such a basis, an accusation of criminality against the directors of their own company in August, 1894, is, at least, shocking, and, before a jury, familiar with the character of the Brooklyn men at that time, would be absolutely abhorrent.

Mr. Felix Campbell died the president of the Peoples' Trust Company after a life of stainless integrity among our business men. William Marshall, rightfully bearing the title of "the noblest Roman of them all," had no peer in this particular among our people.

We are indebted to the leading witness of the plaintiff for a covert but touching tribute to William A. H. Bogardus.

By Mr. Severance:

Q. All the entries upon the Brooklyn Heights

books in relation to that matter, were made originally by Mr. Bogardus? A. Yes.

Q. He took the responsibility of everything himself? A. I don't think so. \* \* \*

By Mr. De Witt:

Q. When Mr. Severance asked you a question in which he said that Mr. Bogardus took the responsibility alone, you stated you did not think so, what did you mean by that? A. I meant Mr. Bogardus would not assume any responsibility for which he did not have any authority.

Mr. Severance: I move to strike out Mr. Noble's answer as a conclusion.

By Mr. De Witt:

Q. Mr. Bogardus is dead? A. Yes.

Q. You knew him well? A. I certainly did, yes.

(Minutes, vol. 5, pp. 2440, 2441.)

The reputation of E. W. Bliss, of the well-known manufacturing firm of Bliss & Company, must be familiar to everybody. Crowell Hadden is of the same kind. S. B. Dutcher is the president of The Hamilton Trust Company. Seth Keeney, now at the ripe age of seventy-eight years, is equally well known. Theodore F. Jackson is one of the oldest and most reputable members of the Kings County Bar.

It is intolerable to assume that these men, actuated by purely selfish and individual motives, could betray their trust by perpetrating such a wrong in their official capacity. But what measure of apology will be rendered by the learned counsel to D. H. Valentine who, at this day, is a director of the Rapid Transit Company, (which is the actual owner of this claim and the actual plaintiff in this

suit), and who in personal character and intelligence is the equal of any man in our city. And in what way will they appease the shade of the venerable John G. Jenkins, who was their trusted and potential officer to the last and who betrayed his trust in the manner stated by the counsel without any hope of reward and with an absolute certainty of serious loss, since he at the time held no stock whatever in the Brooklyn City Railroad and \$30,000 of par value in the Long Island Traction Company ?

In respect to Mr. Daniel F. Lewis, characterized by the learned counsel as "a man named Lewis," all the foregoing facts and commendations apply with redoubled force. Mr. Lewis' ownership of Brooklyn City Railroad stock was \$135,000 in par value and his ownership of the Long Island Traction Company stock was \$299,000, at par value and any diversion of funds from the latter company to the former would be to him personally a pecuniary loss. He had likewise before him the vast gain to be derived by him from the maintenance of the solvency, and from the future prosperity, of the large corporation of which, at the time, he had recently been made president.

At the time of his death, Mr. Lewis' father was the respected treasurer of the Brooklyn City Railroad Company. His son began his connection with that Company in 1868, and in 1886, he was elected president and continued in the occupation of that office until February, 1894. During his presidency the career of the company had been one of remarkable prosperity. He followed the great properties, with which he had been so long familiar, into the new corporation, and, at the close of his services in the new corporation, he was given an extraordinary mark of approbation and respect by

the unanimous vote of its directors. He is now the chief officer of the United States Title Guaranty & Indemnity Company in the Brooklyn branch of that corporation.

There is not a word in the entire record aspersing his reputation; and the aspersion of counsel in the opening falls of its own weight.

(2).

This action was not begun until nearly six years had elapsed; nor was the claim contained in the complaint ever asserted by the plaintiff before nearly six years had elapsed when it was somewhat abruptly and vaguely communicated by a letter, under date of March 2, 1900, to the defendant, with the danger of the applicability of the Statute of Limitations quite apparent. (Minutes, vol. 6, pp. 2891-2896.) Subsequently to the service of the summons, unaccompanied by a complaint, the vice-president of the Brooklyn Heights writes to apologize for the abruptness with which the action was begun and says that he "intended accompanying it by a letter explaining that it was sent in no spirit of discourtesy, but merely to protect our legal rights." (Minutes, vol. 5, pp. 2865-2867.) That this action was begun without notice of the claim to the defendant, that the claim sued on was never made or asserted by the plaintiff and that the defendant was wholly without notice or knowledge of it, until when or after this action was brought, is plain beyond contradiction. This action was begun by the service of a summons without a complaint (Minutes, vol. 5, p. 2867.) on March 6th, 1900. The letter containing the first hint of such a claim was dated March 2, 1900 (Min-

utes, vol. 6, p. 2891) and Col. Williams himself seems to be in doubt whether such notice was given immediately before or after suit brought. The testimony of the defendant's witnesses is clear and to the point. Says MR. LEGGET: "No claim was made to the company until the summons was served that I know of, and I was on the executive committee and it would undoubtedly have come before us if there had been" (Minutes, vol. 6, pp. 3420-3421). And again under cross examination: "I want to impress upon you that I have been on the committees with those gentlemen forty or fifty times, or the various ones, and until this suit was brought I never heard a whisper that there was any dissatisfaction or any claim whatever; I want to impress that most strongly." (Minutes, vol. 6, p. 3480.)

In respect to this, MR. EDWARD MERRIT, the president of the defendant, testifies as follows:

Q. Did you ever hear from the Heights Company that they had any claim whatever upon the fund provided to be furnished by the Brooklyn City Company about the time of the commencement of this action? A. No sir, never until a few days before the commencement of this action. (Minutes, vol. 6, p. 3451.)

The change of officers and directors of the plaintiff had just previously occurred. For more than five years after the transfer of defendant's railroads, to the lessee and for more than five years after the discharge of all the plaintiff's financial obligations, in respect to the work of conversion and for more than five years after the accord and satisfaction and the settlements of all claims in respect thereto between both corporations, each corporation and the officers of each corporation having acted and dealt with each other on the basis of such settle-

ment and accord and satisfaction, without any hint of a claim in derogation thereof, and for more than fourteen years and up to the present time the plaintiff has paid ten per centum per annum upon the capital stock and interest upon the bonds of the defendant, notwithstanding the commencement of this action in 1900.

This, as will be seen, is a plain construction of the lease in favor of the defendant's contention as a matter of law.

"It is admitted by both parties that the plaintiff has paid the rentals under the lease; to wit: has paid to the defendant an amount equal to the interest on the outstanding bonds of the defendant, and to ten per cent. upon the outstanding capital stock of the defendant from June 6th, 1893, to the present time."

(Stipulation, Minutes, vol. 8, p. 7482, October 14, 1908).

## LAW.

### POINT FOURTH.

The extended acquiescence in the foregoing construction of the lease by both parties thereto, involved in the failure to set up any such claim as that embraced in the complaint for a series of years and involved in the payment of the ten per centum on the capital stock and interest on the bonds over a period of more than fourteen years, amounts, in law, to a practical construction of the lease *inter partes* which is binding both upon the lessor and the lessee.



Says Mr. Justice Swayne, in *Insurance Company v. Dutcher* (95 U. S., 269, 273), 'the construction' of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done."

This rule is approved and applied in *Woolsey v. Funke* (121 N. Y., 87, at 92); *Nicoll v. Sands* (131 N. Y., 19, at 24); *Fox v. Coggeshall*, (95 App. Div., 410, 416); *McClanathan v. Friedel* (85 Hun, 175); *Snyder v. Seaman* (2 App. Div., 258); *Hazleton v. Webster* (20 App. Div., 177, 186; aff'd, 161 N. Y., 628); *Anderson v. English* (105 App. Div., 400).

The case of *Snyder v. Seaman*, *supra*, is in point and decisive. It was there held that, there being a doubt as to the meaning of the partnership agreement, the construction adopted by the partners, themselves, was controlling. And, after reviewing the foregoing cases, the Court, quoting from Judge Story, adds, at pp. 262, 263: "In all cases of doubtful interpretation the actual construction adopted by the partners in their partnership transactions will be, and indeed ought to be, adopted as the true, legitimate and appropriate interpretation intended by themselves."

In *Fox v. Coggeshall* (*supra*, at 416), the Court says:

"It has been many times held that the practical construction put upon a contract by the parties to it is sometimes almost conclusive as to its meaning (*Nicoll v. Sands*, 131 N. Y., 24), and that there is no surer way to find out what the parties mean than to see what they have done (*Insurance Company v. Dutcher*, 95 U. S., 273.)"

So far as the original parties to the lease were concerned, there was never any dispute upon this

subject. The parties who made the lease knew what was the intent and meaning of these provisions and no question whatever was raised as to the practical construction of the lease until this action was instituted.

Who knew best the true intent and meaning of this lease—the officers, directors and stockholders of the two companies who drew it up and adopted it or the officers directors and stockholders of the Brooklyn Rapid Transit Company, which is the virtual plaintiff in this case ?

#### POINT FIFTH.

**The adjustment in August, 1894, comprised an account stated by all the parties in interest, followed by an accord and satisfaction. The tripartite agreement is final and conclusive.**

(A.)

An account stated, examined and acquiesced in by all parties is final and conclusive.

“It was no defense to this action for the defendant to prove that he did not owe plaintiff anything. The plaintiff having made a claim against him and he having disputed it, and the parties having settled the dispute by agreeing upon the amount due in an account stated, which the defendant promised to pay, that promise is founded upon a sufficient consideration and can be enforced against him, although he might be able to prove that nothing was, in fact, due from him.”

Dunham vs. Griswold, 100 N. Y., 224, 226.

"When parties meet upon equal terms, and adjust their differences, both are concluded from any further litigation of the matter. One party is not at liberty to say that the sum paid, or agreed to be paid, was too much; nor the other, that it was not enough."

Stewart vs. Ahrenfeldt, 4 Denio, 189, 190.

"Compromises of disputed claims, fairly entered into, are final, and will be sustained by the courts without regard to the validity of the claims."

Wehrum vs. Kuhn, 61 N. Y., 623.

An account stated cannot be attacked for fraud after the lapse of ten years, even in an action brought for the recovery of money under a contract within the six-year period of limitation.

Kingsley vs. Melcher, 56 Hun, 547.

(B.)

An instrument establishing an accord and satisfaction cannot be attacked by parol evidence used either to explain, modify or contradict such a writing. The rule which excludes such evidence applies not only to prior and contemporaneous oral declarations, but with equal force to subsequent declarations. The object of putting agreements into writing is to exclude, as said by Lord Coke, a resort to "the uncertain testimony of slippery memory." A writing would be of little consequence unless in construing it judges are to be confined to the language used.

Mott vs. Richtmeyer, 57 N. Y., 49, 58, 59.

House vs. Walch, 144 N. Y., 418.

"When \* \* \* any contract or grant, or any other disposition of property, has been reduced to

the form of a document or series of documents, no evidence may be given \* \* \* of the terms of such contract, or other disposition of property \* \* \* ; nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence."

Chase's Stephen's Digest, 2nd ed., Art. 90,  
p. 219.

#### POINT SIXTH.

If, notwithstanding the conclusive character of the foregoing points of law and of fact, it remains to be argued whether plaintiff's claim that six million dollars was to be furnished by the defendant after June 6, 1893, that being taken as the date when the lease actually took effect, in strict conformity to the terms of the lease, is sound, then it may be confidently asserted that such a provision in the lease is purely technical in character, relating merely to time of performance; and if, after the execution of the lease, a parol understanding was reached, different in time, but especially advantageous to the lessee, at whose request it was made, and this parol understanding was carried out, approved and ratified by both parties, it cannot, as matter of law, thereafter be called in question.

General El. Co. v. Nat. Contracting Co.,  
178 N. Y., 369.

McCreery v. Day, 119 N. Y., 1.

Miller v. Sullivan, 33 Misc., 752.

Thomson v. Poor, 147 N. Y., 402.

Solomon v. Vallette, 152 N. Y., 147.

Eagle Iron Works v. Farley, 83 App. Div., 82, aff'd, 178 N. Y., 595.

Hellman v. City Trust, etc., Co., 111 App. Div., 879, 881, and cases cited.

Birkett v. Nichols, 184 N. Y., 315, 320.

The arrangement, orally made, between the representatives of the parties, on February 15, 1893, respecting the continuation of the work of conversion out of the fund to be provided by the lessor during the pendency of the Markey injunction and the interval necessary to raise the \$4,000,000 guaranty fund, having been made at the request of the lessee and to its advantage and being beneficially in furtherance of the chief objects and purposes of the lease, was within the rights and powers of the parties and valid and binding as a matter of law.

“Another rule requires that the contract should be supported rather than defeated. Thus, a deed which cannot operate in the precise way which it is intended to take effect, shall yet be construed in another, if, in this other, it can be made effectual, and if a charter will bear a double construction, and in one sense it can effect its purposes and in the other not, it will receive the construction, which will make it efficacious. And even parts or provisions which are comparatively unimportant and may be severed from the contract without impairing its effect or changing its character, will be suppressed, as it were, if in that way and only in that way, the contract can be sustained and enforced.”

2 Parsons' Contracts, 8th Ed., p. 621, \*p. 504.

“The judges in these latter times (and I think

very rightly) have gone further than formerly, and have had more consideration for the substance, namely—the passing of the estate, according to the intent of the parties, than the shadow, namely—the manner\* of passing it.”

Per Willes, C. J., in *Roe v. Traumarr*,  
Willes, 684, quoted in 2 *Parsons' Contracts*, 8th Ed., p. 621, note b.

“ The construction ought to be made on the entire deed, and not merely upon any particular part of it; and, therefore, every part of a deed ought, if possible, to take effect, and every word to operate. A deed, and especially a deed-poll, is always construed most strongly against the grantor. If a deed cannot operate in the manner intended by the parties, the judges will endeavor to construe it in such a way as that it shall operate in some other manner; it being a maxim *quando quod ago, non valet ut ago, valeat quantum valere potest* \* \* \* Where a deed may enure in different ways, the person to whom it is made shall have his election which way to take it, and he may take it that way as shall be most for his advantage.”

*Jackson v. Blodgett*, 16 Johns, \*172, \*178,  
\*179.

“ The third main rule is that that construction will be given which will best effectuate the intention of the parties, to be collected *from the whole of the agreement*; and to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it and the objects which they had in view.”

Lawson on *Contracts*, 1st Ed., § 388,  
p. 418.



(A.)

The Court of Appeals hits the plaintiff's foolish contention in this particular a fatal and decisive blow in the case of *General El. Co. v. Nat. Contracting Co.* (178 N. Y., 369, 375, 376). Says the Court, O'Brien, J.:

" We think that, under the circumstances, the  
" defendant cannot escape responsibility on the  
" ground that the extension of the time of per-  
" formance by the plaintiff was not in writing.  
" That was a stipulation which the parties, for  
" their mutual convenience, could have waived or  
" disregarded. According to the findings of fact a  
" situation had arisen between the defendant and  
" the power company that had not been foreseen  
" at the time of the execution of the contract, and it  
" would seem to be only reasonable to say that the  
" parties to this contract could have accommodated  
" themselves to this new situation without writing.  
" (Dunn vs. Steubing, 120 N. Y., 232; Thomson  
" v. Poor, 147 N. Y., 402; Home v. Guardian Mut.  
" L. Ins. Co., 67 N. Y., 478; Quick v. Wheeler, 78  
" N. Y., 300). The defendant could, no doubt,  
" have insisted upon strict performance of  
" the contract according to the written instru-  
" ment and, had it assumed that position, the  
" plaintiff would then know where it stood, but the  
" defendant permitted the plaintiff to go on with  
" the work after the specified date, and indeed was  
" willing that it should do so, and hence, we think, it  
" is estopped to claim that this was not performance  
" of the contract. Excuse for non-performance by  
" the plaintiff on the precise day is not the plain-  
" tiff's position, but it insists that it is a case of  
" performance because the defendant is estopped,  
" under the circumstances of the case, to deny it  
" (Gallagher v. Nichols, 60 N. Y., 438, 448; Smith

“ v. Wetmore, 167 N. Y., 234). It is, undoubtedly,  
 “ true that in many cases of mercantile contracts  
 “ time is of the essence. There are numerous  
 “ authorities, which may be cited in support of that  
 “ proposition, but this was a contract to manufacture  
 “ and deliver goods at a specified day in the future  
 “ and the time of delivery was changed in the in-  
 “ terest and for the accommodation of both par-  
 “ ties. It was, therefore, in the power of the par-  
 “ ties to change the terms of the contract by parol  
 “ as to time. It is found that they did actually,  
 “ make the change, and the defendant, under the  
 “ circumstances of the case, is estopped from set-  
 “ ting up the defense of non-performance as to  
 “ time.”

In *McCreery, et al., v. Day* (119 N. Y., 1, 8, 9),  
 the Court of Appeals, Andrews, J., says :

“ A recent English writer, referring to the effect  
 “ of the common law Procedure Acts in England,  
 “ says, ‘ The ancient technical rule of the common  
 “ law, that a contract under seal cannot be varied  
 “ or discharged by a parol agreement, is thus practi-  
 “ cally superseded.’ (Leake on Contracts, 802).  
 “ Courts of equity often interfered by injunction to  
 “ to restrain proceedings at law to enforce “ judg-  
 “ ments, covenants, or obligations equitably dis-  
 “ charged by transactions of which courts of law  
 “ had no cognizance (2 Sto. Eq., Sec. 1573.) It is  
 “ a necessary consequence of our changed system  
 “ of procedure, that whatever formerly would have  
 “ constituted a good ground in equity for restrain-  
 “ ing the enforcement of a covenant, or decreeing  
 “ its discharge, will now constitute a good equita-  
 “ ble defense to an action on the covenant itself.  
 “ It was one of the subtle distinctions of the com-  
 “ mon law as to the discharge of covenants by  
 “ matter *in pais*, that although a specialty before

“ breach could not be discharged by a parol agree-  
 “ ment, although founded on a good consideration,  
 “ nor even by an accord and satisfaction, yet after  
 “ breach the damages, if unliquidated, could be dis-  
 “ charged by an executed parol agreement, because,  
 “ as was said, in the latter case the cause of action  
 “ is founded ‘not merely on the deed, but on the  
 “ deed and the subsequent wrong.’ (Broom’s  
 “ Legal Maxims, 848, and cases cited.) The ab-  
 “ surd results to which the common law doctrine  
 “ sometimes led is illustrated by the case of *Spence*  
 “ v. *Healey* (8 Exch., 668), in which it was held that  
 “ a plea to an action on covenant for the payment  
 “ of a sum certain, that before breach defendant  
 “ satisfied the covenant by the delivery to, and ac-  
 “ ceptance by the plaintiff, of goods, machinery,  
 “ etc., in satisfaction, was bad, Martin B., saying,  
 “ ‘I am sorry I am compelled to agree in holding  
 “ ‘that the plea is bad. It is difficult to see the  
 “ ‘correctness of the reason upon which the rule is  
 “ ‘founded.’ I suppose there can be no doubt that  
 “ the facts presented by the plea in the case of  
 “ *Spence v. Healey* would have constituted a good  
 “ ground for relief in equity. The technical dis-  
 “ tinction between a satisfaction before or after  
 “ breach, seems to have been disregarded in this  
 “ State, and a new agreement by parol, followed by  
 “ actual performance of the substituted agreement,  
 “ whether made and executed before or after  
 “ breach, is treated as a good accord and satisfac-  
 “ tion of the covenant. (*Fleming v. Gilbert*, 3  
 “ John, 530; *Lattimore v. Harsen*, 14 *Id.*, 330;  
 “ *Dearborn v. Cross*, 7 Cow., 48; *Allen v. Jaquish*,  
 “ Cowen, J., 21 Wend., 633.) So also, a new agree-  
 “ ment, although without performance, if based on  
 “ a good consideration, will be a satisfaction, if ac-  
 “ cepted as such. (*Kromer v. Heim*, 75 N. Y., 574,  
 “ and cases cited.)

“In the present case it may be justly said that  
 “when the agreement annulling the contract of  
 “March 2, 1882, was executed, there had been no  
 “breach by Garrison of his covenant therein, as  
 “he had not been called upon by the plaintiffs to  
 “pay his share of the construction account. But  
 “it was the plain intention of the parties  
 “that the new arrangement, then entered  
 “into, should be a substitute for the lia-  
 “bility of Garrison, present and prospective, under  
 “the contract of March 2, 1882. The transaction  
 “constituted a new agreement in satisfaction of the  
 “prior covenant, and was accepted as such. More-  
 “over, it is admitted by the reply that the contracts  
 “of October 25, 1882, were carried out. It is a  
 “case, therefore, of an executory parol contract,  
 “made in substitution of the prior sealed contract,  
 “afterwards fully executed, which clearly, under  
 “the authorities in this State, discharged the prior  
 “contract.”

See also

Miller v. Sullivan, 33 Misc., R., 752.

In *Solomon v. Vallette* (152 N. Y., 147, 151),  
 the Court of Appeals, by Haight, *J.*, says:

“The contract between the parties provided that  
 “the plaintiff should make no purchases without  
 “the written consent of the defendant. It ap-  
 “pears that he subsequently purchased liquors  
 “with which to supply the saloon conducted for  
 “the defendant by him in his employment. He  
 “tells us that after the written contract had been  
 “entered into the defendant’s attention was called  
 “to the fact that the stock in the saloon would  
 “need replenishing, and that the defendant then  
 “authorized him to make the necessary purchases.  
 “It is true that this direction was oral, but it was

“subsequent to the written contract, and it was  
 “competent for the parties to modify a written  
 “agreement by an oral arrangement.”

At all events, where such a modification has been reached by oral agreement, has been acted upon, approved and ratified by both parties, each party is estopped from calling the change into question.

(B.)

Hollins & Company, owning and controlling all of the stock of the Brooklyn Heights Railroad Company, were the agents of that company. They had negotiated and perfected the lease in that company's behalf and agreed to perfect the organization of the Long Island Traction Company, which was to hold all the stock of the plaintiff, and the stock of the Long Island Traction Company was to be turned over in large part to the stockholders of the defendant, and as all of these promises, agreements and performances had been ratified and fulfilled by the plaintiff company, Hollins & Company must in law be taken as the agents for the plaintiff and the request made by them, after the lease and during the pendency of the Markey injunction, to the defendant company to carry on the work of conversion, so essential to the interests of the plaintiff during the period of plaintiff's inability, at the expense of the fund set apart by the lease to meet the cost of conversion, must be regarded as the request of the plaintiff and is binding upon the plaintiff by well settled authority.

Olcott v. Tioga R. R. Co., 27 N. Y. 546,  
 558, 559.

Fister v. La Rue, 15 Barb. 323.

Bank of Lyons v. Demmon, Hill & Denio,  
 398, 405.

2 Kent's Com., 291.

Emmett v. Reed, 8 N. Y., 312, 316.

Hoyt v. Thompson's Ex'r., 19 N. Y., 207.

Wilson v. Wyandance S. I. Co., 4 Misc., 605.

Little v. Garabrant, 90 Hun., 404 & cases cited; aff'd, 153 N. Y. 661.

Martin v. N. F. P. M'fg Co., 122 N. Y., 165, aff'ing 44 Hun, 130.

Green v. Gans, 91 App. Div., 37, aff'd, without opinion 181 N. Y. 538.

Gamble v. Queens Co. Water Co., 123 N. Y. 91.

"It is well settled, at least in this country, that where a person is employed for a corporation, by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services, according to the agreement. Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract. (Ang. & Ames on Corp., 216, 218, ch. 8, Sec. 8, & cases there cited.)"

By Johnson, J., in *Fister v. La Rue*, *supra*.

"The powers of the agent of a corporation are such as he is allowed by the directors or managers of the corporation to exercise within the limits of the charter; and the silent ac-



quiescence of the directors or managers may be as effectual to clothe the agent with power as an express letter of attorney. Judge Story says, in *Bank of U. S. v. Dandridge* (12 Wheat. 64): 'If officers of a corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers shall be deemed rightful, and the delegated authority will be presumed.' This doctrine has often been confirmed (*Melledge v. Boston Iron Co.*, 5 Cush. 175; *Bridenbecker v. Lowell*, 32 Barb. 18; *Perkins v. Washington Ins. Co.*, 4 Cowen, 645, 659, 661; *Hoyt v. Thompson's Ex'r*, 19 N. Y., 207, 218; *Ang. & Ames on Corp.*, 3rd ed., 269); and, applied to the present case, shows that the authority of Wilson cannot now be denied."

By Seldon, J., in *Olcott v. Tioga R. R. Co.*, *supra* at 558, 559.

"And, as has been seen, these rules apply to corporations within the scope of their corporate powers as to individuals.

" 'It seems to be now well settled,' says Chief Justice Shaw (*Melledge v. Boston Iron Co.*, 5 Cush. 158) 'since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from the largest to the minutest and affect almost every individual in the community, are affected like private persons with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence,

ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and generally by those legal and equitable considerations which affect the rights of natural persons.' ”

Mechem on Agency, Sec. 158.

In *Given vs. Gans* (91 App. Div., 37; affirmed without opinion, 181 N. Y., 538),

Gans made an agreement with plaintiff that plaintiff should have half the profits accruing sale of certain kind of cloth to be manufactured by the Given Manufacturing Company and sold by it. The defendant, Gans, was a stockholder, director and President of the company. There were two other stockholders besides the plaintiff and Gans when the contract was made; the situation as to the stock at that time being that of the \$100,000 preferred stock, one Bache owned one-half and Gans the other half, while of the \$1,500 of the common stock Gans owned 5 shares, Bache 5, the plaintiff 3, and one Ban Gerichten 2 shares. Thereafter and before the commencement of the suit Gans had acquired all the stock of the company other than the three shares of common stock owned by the plaintiff. The suit was against the company, as well as Gans, and it was strenuously contended that the company could not be held on a contract so made. But all the Courts held otherwise. Mr. Justice O'Brien says (p. 40):

“As bearing upon the question of the enforceability of this contract, the ownership of the shares of stock becomes a very important feature of the case, though we have not overlooked the distinction which exists as between the powers of a corporation as a legal entity

and the rights of its stockholders, a distinction which was pointed out by the Court of Appeals in *Buffalo L. T. & D. Co. v. Medina Gas Co.*, 162 N. Y., 76. This distinction must always be regarded where a question arises involving the rights of creditors or minority stockholders; *but it is not important in a contest where the rights of creditors are not involved*, and the dispute is between two stockholders who themselves own all the capital stock. Here the plaintiff sues upon a contract which was made between himself and the defendant, Gans, who between them owned all the capital stock of the corporation, and, as stated, *no rights of creditors or other stockholders being involved*, it really in substance gets to be a litigation between the plaintiff and the defendant Gans, though in form a suit is brought against the corporation. *The only persons interested in the corporation, and that will ultimately be injured or benefited by the success or failure of the plaintiff in sustaining the validity of the contract, will be the plaintiff or the defendant, Gans.*"

Independent of the foregoing considerations, the action of Hollins & Co. was binding upon the plaintiff. If the request had been made unauthorizedly by an officer of the plaintiff and all of the stockholders had thereafter approved it, the plaintiff would have been bound.

An approval and request by all the stockholders in advance of an act is equally effectual, as the subsequent approval by all the stockholders of an unauthorized act.

The allowance of the expenditures made subse-

quent to February 14th, 1893, as part of the \$6,000,000 fund was not only authorized originally by all the stockholders of the Heights Company and the work done and expenditures made with knowledge of officers of the company, as appears from the testimony of Mr. Lewis, but also was approved by all the stockholders of the plaintiff company in the settlement and adjustment of the accounts between the two companies, in August, 1894, as the Long Island Traction Company the owner of all the stock of the plaintiff company executed its notes to the Heights Company in the settlement and adjustment of the accounts between the two companies.

The rule, too, is elemental that a corporation cannot accept the benefit of a contract and then set up a lack of authority or other defect in the execution of the contract.

See 10 Cyc. of Law & Proc., pp. 1067-1068, 11, p. 1078, "c."

4 Thompson on Corporations, Sect. 5258;  
2 Spelling on Private Corporations, Sect. 750;

Whitney Arms Co. v. Barlow, 63 N. Y., 62;

Davis v. Harvey Steel Co., 6 App. Div., 166;

Cunningham v. Marsena Springs & F. C. R. R. Co., 63 Hun, 439;

Givens v. Gans, 91 App. Div., 37; affirmed without opinion in 181 N. Y., 538;

Bissell v. M. S. & N. I. R. R. Co., 22 N. Y., 258;

Woodruff v. Erie R. Co., 93 N. Y., 618.

When stockholders neglect promptly and actively to condemn the acts of the directors, of which

they may be presumed to be aware, they will be deemed to have acquiesced in those acts.

Kent v. The Quicksilver Mining Co., 78 N. Y., 159.

Windmiller v. Standard Distilling & Distributing Co., 114 Fed. Rep., 491 and 115 Fed. Rep., 748.

N. W. T. Co. v. Beattie, L. R., 12 App. Cases, 589. ✓

Where one of the directors of a company contracted with his colleagues to sell to the company a vessel which he owned for a price named, and the contract was in fact a fair one, but it was admitted to be voidable, and it was held that the vendor director had a right at a meeting of the shareholders to vote in favor of ratifying such contract and concluding such purchase. \* \* \* It was said that a resolution of a majority of the shareholders upon any question with which the company was competent to deal was valid and binding upon the minority. In this case there was no minority.

See also

Hodge vs. U. S. Steel Corporation, 54 Atl. Rep. 1 (Court of Errors and Appeals of New Jersey).

Burland vs. Earle, L. R., App. Cas. (1902), 83.

Under the evidence in this case there is no question but that the continuance of the work of conversion after February 14th, 1893, was for the benefit of all parties interested.

Here the doctrine as I have read it and the doctrine of estoppel *in pais* indubitably apply because as Hollins & Company were the owners of the plain-

tiff's stock, were the authors of the scheme for consolidation, were the men who made the plan to organize the Long Island Traction Company and to deliver its stock, and as all these acts and performances by them were ratified and fulfilled by these companies, they must be taken on February 15th, when the question of the continuance of the work was concerned, as representing this plaintiff; and not only was their testimony admissible because of that but because all the officers of the plaintiff corporation were privy to this business, had full knowledge of it, and it was afterwards ratified by the corporation itself.

## **SECOND BRANCH.**

### **POINT SEVENTH.**

#### **The trial has been irregular and invalid.**

The defendant persistently urged that it was the duty of the referee, in the first instance, to try and determine the issues of law and fact involved in the case and allow an accounting only in the event that such a mode of trial should disclose the necessity of an accounting, and then only to the extent that such an accounting might be made necessary by such disclosure.

This contention of the defendant is established by abundant authority in our courts.

The rule has been plainly extended in this State to actions at law where a jury trial has been waived, and even in actions, tried by a jury.

Cornell v. Cornell, 96 N. Y., 108, at 112.

Murtha v. Curley, 90 N. Y., 372.



Hathaway v. Russell, 7 Abb. N. C., 138.  
Peck v. Vandemark, 99 N. Y., 29.

Note 21 Abb. N. C., 347, reviewing several  
of the foregoing cases.

Malone vs. St. Peter's and Paul's Church,  
172 N. Y., 269, 279.

Johnson vs. A. A. R. R. Co., 139 N. Y.,  
449.

The rule is well settled in equity, and if the  
plaintiff could be permitted an accounting under  
its complaint, the action would be equitable in  
character.

Hilton v. Hughes, 5 App. Div., 226, and  
cases cited.

Jones v. Lester, 77 App. Div., 174, and  
cases cited.

S. T. & T. Co. v. Bickford, 142 N. Y.,  
224.

Mundorff v. Mundorff, 1 Hun, 41.

Manning v. Manning, 87 Hun, 221.

N. Y. Note v. Hamilton Eng. Co., 56 App.  
Div., 488, at 492.

R'd Co. v. Swazey, 23 Wall., 405.

Grant v. Phoenix Ins. Co., 106 U. S., 429.

Parsons v. Robinson, 122 U. S., 112.

Coit v. Goodheartz, 5 App. Div., 115.

The point was raised before Judge Dillon on two  
appropriate occasions (Minutes, vol. 1, pp. 86, *et*  
*seq.*; vol. 2, pp. 961-981; vol. 5, pp. 2504-2528, and  
see also vol. 1, pp. 218, 219, vol. 6, pp. 3345-3346), and  
the authorities and arguments in its support were  
fully presented. Upon it Judge Dillon reserved  
his decision until the final consideration of the  
whole case (Minutes, vol. 1, pp. 107-111; vol. 2, pp.  
961, *et seq.*, 981.)

Upon Judge Dillon's resignation the defendant brought up the point before the Supreme Court on a motion to restore the case to the calendar, to the end that the issues of law and fact arising upon the pleadings be, in the first instance, tried and determined by the Court, and an accounting had only in the event of an interlocutory decree, showing such an accounting to be necessary and prescribing the extent to which it should be made. The Supreme Court simply decided that the defendant, having originally stipulated to the appointment of Judge Dillon as referee, it was bound to continue the case before another referee and remanded the issues to the determination of such a referee in the first instance. It is fair to say that, upon the argument before Justice Gaynor, the learned Justice expressed his opinion favorable to the contention of the defendant, and the Appellate Division said, in announcing its rigid adherence to the Code section as to the effect of the original stipulation, (105 App. Div., at 89): "The mandate of the statute, as interpreted by the decisions, and the acts of the parties, preclude any discussion upon the broad lines suggested by the learned counsel for the appellant, while the suggestions as to the policy of the procedure can be addressed to the referee."

When the point was first raised before Judge Dillon, counsel for the plaintiff urged that some parts of the accounting might throw light upon the construction of the contract, and Judge Dillon, while he overruled defendant's position, stated that he did not wish to express himself as in opposition thereto and that he would take up the whole question again in the final decision, and notified counsel for defendant to bring the point up at a future time (Minutes, vol. 1, pp. 107-111). When it was again presented to Judge Dillon, upon an objection to testimony in the nature of an account-

ing, which, it was conceded, had no relation to any question of construction of the lease, he again expressed the desire to have his mind left free upon this matter until his final determination (Minutes, vol. 2, p. 961 *et seq.*, at 980; vol. 5, pp. 2525-2528); and it is not to be disputed that his decision thereon was formal and tentative, and to be re-opened upon the final consideration of the case. He wished to try the case according to the practice of the United States courts, of which he had been a member, where all the testimony is taken before a commissioner and then submitted in mass to the court for adjudication upon all questions therein involved.

On the coming on of the case before Judge Herrick this question, and the authorities and arguments bearing thereon, were presented to him under similar objections and upon a like motion, Judge Herrick said (Minutes, vol. 5, p. 2663): "Whatever I may think of it as an original proposition, after the rulings which have been made by Judge Dillon and the Court, and the labor that has been put upon the case so far, I think I would hardly be warranted in dismissing it now. It may very well be that I might have differed from Judge Dillon on the original proposition. I will deny the motion."

Counsel for defendant understood this, following the rulings of Judge Dillon, to hold the matter up for full and final decision at the point now reached in the course of this trial. If that understanding is accurate, then it is now insisted that the whole course of the trial has been irregular and invalid, and the case must, therefore, be dismissed.

If, however, upon the other hand, your Honor meant by your ruling to make a final determination of the question of the correct mode of prac-

tice and procedure of the trial in this case, then it must rest as a reversible error in the cause.

#### POINT EIGHTH.

**It was manifestly improper to allow the plaintiff, without any application to amend its complaint, to change the action from an action at law to recover moneys on contract, to an action in equity to recover upon an accounting based upon the assertion of fraud.**

(1.)

This was persistently done on the trial in face of the defendant's objections, still to be determined by the referee (Minutes, vol, 1, pp. 108-111, 219; vol. 2, pp. 961 *et seq.*, 968, 981; vol. 5, pp. 2505, 2528, 2644, *et seq.*, 2655, 2663, 2664, 2867-2873; vol. 6, pp. 3345, 3346.)

Conscious of the insupportable weakness of the plaintiff's claim, as contained in the complaint, which, it is now quite obvious, was brought for an ulterior purpose, the learned counsel in behalf of the plaintiff, at the very outset, undertook to shift the character of the action, as above stated.

Says Prof. Collin, in his opening for the plaintiff :

Mr. Collin: "There is upwards of \$600,000 which, according to our analysis, are false and fictitious entries as a part of the \$6,000,000 fund. "For instance, there is a series of journal entries here made and dated back to June 30, 1893, several months back of the time the entries were made, one of which was—without undertaking to go into all of them—one of which was, for instance,

“ \$90,000, being a journal entry of June 30, 1893,  
 “ appearing on their bill of particulars for a portion  
 “ of a dividend paid January 3rd, 1893, before the  
 “ lease took effect, a dividend on the stock of the  
 “ Brooklyn City Company before the lease was  
 “ made, before the first meeting of the Board of  
 “ Directors officially passing upon the lease, a  
 “ dividend paid January 3rd, 1893, a part of that  
 “ dividend of \$90,000 is attempted to be charged  
 “ by a journal entry made long after, as a part of  
 “ the performance of that \$6,000,000 obligation.  
 “ Another item of \$1,397.23 was a journal entry as  
 “ of date June 30th, 1893, made in September, the  
 “ latter part of September, 1893, charging con-  
 “ struction and crediting various operating ac-  
 “ counts. It was made, apparently, as near as I  
 “ can analyse it, upon the assumption that prior to  
 “ June 6th, 1893, a large part of the salaries of  
 “ officers, clerks and counsel, shoeing horses, light  
 “ and heat, and use of cars, had been charged for  
 “ construction purposes—while charged to operating  
 “ expenses, ought to have been charged to construc-  
 “ tion. Under any circumstances this charge could  
 “ only relate to the period from April 17th, 1893, to  
 “ June 6th, 1893, under any proper construction of  
 “ the lease. From June 6th, 1893, to September,  
 “ 1893, when it was made, during that short period  
 “ of seven weeks, that anything like \$161,000 was  
 “ a proper portion of the operating expenses  
 “ chargeable to construction is absolutely absurd.  
 “ For instance, there is one item of \$24,000 for car  
 “ fares of employees engaged in construction,  
 “ amounting to 480,000 fares in the short period  
 “ of seven weeks. The absurdity of that is shown  
 “ by contrast with a similar account of the Heights  
 “ Company when the work of construction was no  
 “ less active, when from June 6th, to September  
 “ the car fares of employees in the work of con-

" struction aggregated only \$3,000 against \$24,000.  
 " Another instance of the improper making up of  
 " the \$161,000 is the item of salaries of officers and  
 " clerks. The proportion chargeable to construc-  
 " tion they place at \$22,700 ; the entire pay roll of  
 " officers, clerks and directors from February 1st to  
 " June 6th, 1893, was only \$28,000 and for the  
 " period from April 17th to June 6th, was only  
 " about \$12,500, and from June 6th still less, so  
 " that the charge of \$22,700 as the part represent-  
 " ing construction is simply grotesque, absolutely  
 " indefensible, cannot be reconciled with good faith  
 " in the making up of these books. The other  
 " items making up the \$161,000 are equally inde-  
 " fensible as a charge against the \$6,000,000.

" In addition to that, in the fall of 1893, the  
 " directors voted an extra compensation to one of  
 " the officers who had acted as secretary and treas-  
 " urer during a part of the year 1893 for the Brook-  
 " lyn City Railroad Company ; they voted in the  
 " fall of 1893 \$1,000 for extra services to that  
 " officer, and charged that against the Brooklyn  
 " Heights Company, extra services prior to June  
 " 6th, 1893, and charged it against the Brooklyn  
 " Heights Company as part of the expenditures  
 " under the \$6,000,000 clause. Another item—I am  
 " only giving illustrative items—was a journal  
 " entry of \$27,619.67 of June 30th, 1893, for in-  
 " terest on loans from October 13th, 1892, to Janu-  
 " ary 24th, 1893, interest on loans back before the  
 " lease was thought of, at least, back before the  
 " lease was executed, most of it before the lease  
 " was acted on first by the Board of Directors of  
 " the Brooklyn City, and interest on loans back  
 " there is charged by a journal entry as a part of  
 " the performance of the obligation to expend  
 " \$6,000,000 for construction, loans which were or  
 " might have been repaid, and probably were re-



“ paid, out of the proceeds of the first installment  
 “ of \$3,000,000 of stock and bonds which they then  
 “ had on hand. This was done as I say, long after,  
 “ entered as of June 30th, 1893, put on the books  
 “ in September, 1893, and dated back to June 30th,  
 “ 1893, for interest on loans from October, 1892, to  
 “ January, 1893, and this is charged as part of the  
 “ performance of the \$6,000,000 obligation. The  
 “ interest had been paid, of course, at the time it  
 “ was due, and had been charged against income;  
 “ six months later the charge was transferred to  
 “ construction account. Now, whether it was  
 “ properly charged to income or construction ac-  
 “ count was wholly immaterial to us, but because  
 “ they turned it over to construction account gives  
 “ them no right to charge it against us as a part of  
 “ the \$6,000,000 obligation for conversion.”

“ The Referee: ‘What is this suit; for dam-  
 ages?’

“ Mr. Collin: ‘This suit is for the balance of  
 the amount they had agreed to pay, and damages  
 for their failure to perform the balance.’”

(Minutes, vol. 1, pp. 63-67.)

“ Now, if your Honor please, these are signifi-  
 “ cant items showing an intent along through this  
 “ period after the controversies had arisen between  
 “ the companies, not to faithfully and honestly  
 “ carry out the obligation even on their own theory.  
 “ I don’t well see how I can do otherwise than to  
 “ charge that this item of deficiency in the supply  
 “ and material account was a false and fraudulent  
 “ item.”

(Minutes, vol. 1, p. 70.)

Mr. Collin’s proposition is *triplex*. He claims,  
 first, that nothing expended between February 14,

1893, and June 6, 1893, in the work of construction is chargeable to the plaintiff; secondly, failing in this, that nothing expended in the same work, between April 17, 1893, and June 6, 1893, is chargeable to the plaintiff; and failing in this, lastly, that about \$600,000 is due the plaintiff, to be shown by an accounting, and a correction of fraudulent entries, made by the defendant in its books.

(Minutes, vol. 1, pp. 73, 74, 75.)

“Mr. Trull: May I request you, inasmuch as you have charged that these accounts are frauds—fraudulent and fictitious—that you will furnish a list of those items that constitute that?”

Mr. Collin: They are all in the stipulation.

“Mr. Trull: It is the first time that any such charge has been made, and I would like to identify them.

(Minutes, vol. 1, p. 80.)

“Mr. Collin: I think the salient facts in reference to that accounting can be stipulated.

(Minutes, vol. 1, p. 84.)

“Mr. Collin: If your Honor please, we undertook to get a stipulation, but we did not succeed. I do not think that the accounting part of this which has been referred to need take any considerable part of your personal attention.”

(Minutes, vol. 1, p. 87.)

The plaintiff, after the commencement of this action, was given access, full and complete, to all the books, vouchers and records of the defendant, and, after the completion of their examination and

the trial approached, it obviously concluded that, instead of their claim upon contract, it would be wiser to have an accounting and go for damages on a charge of conversion. Failing, therefore, to procure a stipulation, such as it desired, the trial was then turned into the examination of the defendant's books, vouchers and records, as well as the books, vouchers and records of the plaintiff, an accounting which lasted over a period of three years.

"Mr. De Witt: They are undertaking, if I understand them correctly, to change this action from an action on a contract for damages into an action for an accounting. They have been busy delving into our books for a year or two; there is nearly a trunk full of books here to-day, and Mr. Collin, in his opening address, gave some statements from these accounts, which he went so far in his opening as to say were fraudulent. Now, if that issue is to be opened there are a multitude of living witnesses upon one side. The bill of our expert accountants, of the labors they have gone through, is something enormous \* \* \* This is an action, to put it crudely and briefly, for money demanded on contract; the existence and extent of the liability being dependent mainly on the construction of the lease, which is the contract. Plaintiff's counsel in opening undertook to turn it into a question of accounting under two heads: First, amounts expended between February 14th, 1893, and June 6th, 1893; second, amounts expended between April 17th, 1893, and June 6th, 1893 "

(Minutes, vol. 1, pp. 88-90).

Thereupon at the close of this opening of Prof. Collin, the plaintiff proceeded with an accounting, ranging over the books, vouchers, checks, etc.,

of both companies, which continued for a period of over three years. To this course urgent objection was made by the defendant.

(Minutes, vol. 2, pp. 961-981.)

Mr. Severance, in his opening before Judge Herick, in which we are indebted for his statement that a proper construction of the lease would largely determine the issues in this case, a statement which would have obviously avoided the whole time consumed in the matter of accounting had it been made three years before, supplements Prof. Collin's statement by a few more broadcast assertions of fraud than Mr. Collin had had the temerity to conceive.

(Minutes, vol. 5, pp. 2625-2627, 2629.)

Mr. Severance then proceeds to charge in substance and effect that the whole matter of the settlement and accord and satisfaction of 1894 was the result of a conspiracy and fraud, carried on by collusion between the officers of the two corporations, the officers of the plaintiff, at that time, having been elected to act in the interest of the defendant to serve their own selfish and individual interests.

(Minutes, vol. 5, pp. 2632-2634.)

A more stalwart fraud than that depicted by Mr. Severance could not well be imagined between two corporation!

Mr. Severance continues: "The testimony will further disclose that this thing ran along until Colonel Williams and the other gentlemen came into office in this company, an investigation was then set on foot, they were unable to understand

why this fund was exhausted, and the investigation disclosed these fraudulent, fictitious entries, and the whole scheme that had been perpetrated by these people, and this suit was the result."

(Minutes, vol. 5, p. 2638.)

How comes it, then, Mr. Severance, that the complaint gives no hint of any such fraud as that which you have imagined?

The complaint is very simple and easily understood. It contains a succinct statement of a well-known cause of action, quite common in our courts. When the plaintiff undertook, under such a complaint, by an elaborated examination of the defendant's books consuming a period of over four years to show a wrongful conversion of moneys in a vast amount by false and fraudulent manipulation of accounts, it violated the rules both of evidence and pleading as established in this State by abundant authority.

No rule of law and of justice is better settled than that precluding a recovery by a plaintiff upon any other cause of action than the one he pleads and of which a defendant thus has notice. An action at law, upon a contract or for a breach thereof or for damages for a tort, brought, as shown by the pleadings, for one cause of action or upon one theory, cannot be changed to another, or turned into an equitable action, upon the trial over the defendant's objection and without amendment of the pleading. Where there is such a variance between the pleading and the proof, a dismissal of the complaint should be granted.

Reed v. McConnell, 133 N. Y., 425.

Brightson v. Claflin Co., 180 N. Y., 76.

Beard v. Yates, 2 Hun, 466.

Northam v. Dutchess County Mut. Ins. Co., 177 N. Y., 73.

Stephens v. Meriden B. Co., 160 N. Y., 178.

McClung v. Foshour, 47 Hun, 421; aff'd, 113 N. Y., 640.

Zoller v. Kellogg, 66 Hun, 194.

Southwick v. First Nat. Bank, 84 N. Y., 420.

Stevens v. New York, 84 N. Y., 296.

Hecla Powder Co. v. Hudson River Ore & Iron Co., 7 Misc., 630; aff'd, 152 N. Y., 619.

King v. Mackellar, 94 N. Y., 317.

English v. Hanford, 75 Hun, 428, 432.

Gas Light Co. v. Rome, W. & O. R. R. Co., 51 Hun, 119.

O'Brien v. Fitzgerald, 6 App. Div., 509, 513; aff'd on opinion below, 150 N. Y., 572.

Burris v. Adams, 96 Cal., 664,

Mosier v. Kershaw, 16 Col. App., 453.

McCracken v. Robinson, 57 Fed. Rep., 375, 378.

Mayer v. Texas Brewing Co., 26 S. W., 774.

Clark v. Lindsay, 7 Pa. Sup., 43, 47, 48.

2 Abbott's Tr. Brief, Pleadings, 2nd ed., p. 1462, § 261; p. 1466, § 268; p. 1708, § 147; p. 1712, § 149.

Pomeroy's Code Remedies, 4th ed., § 23, p. 39; § 448, pp. 614-616; §§ 450-453, pp. 620-629.

Moak's Van Santvoord's Pleadings, ed. of 1874, pp. 200, 205.

Truesdell v. Bourke, 145 N. Y., 612.

Truesdell v. Sarles, 104 N. Y., 164.



Dalton v. Vanderveer, 31 Abb. N. C., 430  
and cases cited.

2 Abbott's Tr. Brief, Pleadings, 2nd ed.,  
§ 134, pp. 1688-1692 and cases cited.

Pomeroy's Code Remedies, 4th ed., § 23,  
p. 38, and cases cited.

Says the Court of Appeals, Andrews, *J.*, in *Reed v. McConnell* (133 N. Y., 425, 434): "But the rule that a party coming into court asserting one cause of action cannot recover on another and different one, is unchanged. It is essential to the orderly administration of justice and the protection of the rights of litigants. Lawyers could never safely advise their clients, and parties would frequently be misled if any other rule was admitted. Where a cause of action is imperfectly stated, or on the trial a variance is disclosed between the pleadings and the proof, not affecting the essential nature of the claim asserted, the Court has ample power to grant relief without turning a party out of court. But where the allegation of the complaint is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, but a failure of proof, and no judgment can be rendered in favor of the plaintiff upon the pleading as it stands. This is the statute rule and was the rule of the courts before the statute. The authorities upon these general propositions are numerous. We refer to some recent ones only. (*Southwick vs. First National Bank*, 84 N. Y., 420; *Truesdell v. Sarles*, 104 *Id.*, 167.)"

Again by O'Brien, *J.*, in *Brightson v. Claflin Co.*, (180 N. Y., 76, 80, 81), the Court says: "The objection was to the effect that the proof was a departure from the cause of action stated in the complaint." \* \* \*

“ The plaintiff pleaded a written contract for five years, and he recovered for breach of a contract implied by law for one year. We think that the plaintiff did not recover *secundum allegata et probata*, and that this rule was violated at the trial, since the evidence was received under the defendant's objection (*Southwick v. First Nat. Bank of Memphis*, 84 N. Y., 420; *Romeyn v. Sickles*, 108 id., 650; *Day v. Town of New Lots*, 107 id., 148). In these cases it was held that it is a fundamental rule that a judgment shall be *secundum allegata et probata*, and that any departure from that rule is certain to produce surprise, confusion and injustice. It was said, with much force, that pleadings and a distinct issue are essential in every system of jurisprudence and there can be no orderly administration of justice without them. If a party can allege one cause of action and recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary.”

The General Term of the Supreme Court, Fourth Department by Gilbert, *J.*, in *Beard v. Yates* (2 Hun, 466, 467, 468), said: “ We think the ruling of the learned justice at the Circuit was erroneous, for the reason that there was not a variance only, within Sections 169 and 170, but a failure of proof according to Section 171, of the Code” (Now Code §§ 539-541). “ The cases of *Walter v. Bennett* (16 N. Y., 250); *Lewis v. Watt* (36 N. Y., 395); *DeGraw v. Elmore* (50 N. Y., 1), seem to us to be decisive on this point. Nor are the cases, *Conaughty v. Nichols* (42 N. Y., 83), and *Ledwich v. McKim* (53 N. Y., 307), in conflict with these cases. The principle deducible from all of them, is, that the presence of allegations in the complaint, which are irrelevant to the case really made thereby, will not have the effect to change the action from one upon contract

to one in tort, or *vice versa* but that the case really set forth by the plaintiff in this complaint, cannot be changed upon the trial into one of a different nature. Such a principle is obviously necessary to the due administration of justice. While a party is not to be turned out of Court because his pleading contains unnecessary averments, when it does fairly apprise his adversary of the claim made against him, yet he is to be held to a trial of the cause of action, actually set forth. And, when a party sets forth a good cause of action upon contract, and avers and proves additional facts which render the defendant liable for a tort arising from the same cause of action, there is perhaps no hardship in allowing a recovery upon the contract, for a plaintiff may, in general, waive a tort and sue in assumpsit, and the defendant cannot be prejudiced by a recovery in the milder form. But there would be manifest hardship in allowing a recovery for a tort, in an action *ex contractu*, because such a recovery might subject the defendant to an imprisonment of his person. However that may be, we think the salutary rule, that a plaintiff must recover, if at all, according to his allegations as well as his proofs, has not been abolished by the Code."

Again, in *Northam v. Dutchess County Mut. Ins. Co.* (177 N. Y., 73, 74, 75), by Vann, J., the Court of Appeals says: "This does not fall within the class of cases where, although the complaint is insufficient, the proof is sufficient to authorize a recovery and is admitted without objection, and where the pleadings may be amended to conform to the proof. In this case the plaintiff failed to prove the cause of action alleged, and the evidence tending to establish a different cause of action was objected to upon the ground that it was inadmissible under the pleadings and no amendment was

asked for. In such a case, if the plaintiff fails to prove the cause of action set up in his complaint and proper objections are made upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in the plaintiff's favor upon a cause of action not alleged cannot be sustained on appeal, nor after trial can the pleadings be conformed to the proof (*Southwick v. First Nat. Bank*, 84 N. Y., 420; *Truesdale v. Sarles*, 104 id., 164, 167; *Pope v. Terra Haute Car and Mfg Co.*, 107 id., 61; *Freeman v. Grant*, 132 id., 22, 28; *Reed v. McConnell*, 133 id., 425, 434; *Bradt v. Krack*, 164 id., 515, 519)."

Again, in *Stephens v. Meriden Britannia Co.* (160 N. Y., 178, 185), the Court says, by Vann, J.,: "The claim of the respondent, that the judgment should be affirmed because the evidence is sufficient to support a bill in equity, is not well founded. The complaint is in the form of a pure action at law to recover damages for the conversion of personal property, with no allegation to suggest a court of equity as the forum resorted to, except those essential to show the appointment of the plaintiff as receiver, and hence that he had a legal capacity to sue. The plaintiff alleged that the defendants took possession of the property in question and 'unlawfully converted and disposed of the same to their own use', and that the damages sustained thereby amounted to \$3,000. The only relief demanded is for the recovery of that sum and costs. There is not even a prayer for general relief. The trial was had without objection, in the usual way, before a jury; the verdict rendered was simply for a definite sum of money, and when the defendants moved to dismiss because the plaintiff had mistaken his remedy, as an action at law

would not lie; no suggestion was made that the court should grant relief in equity and no such relief was granted. The fact that the judgment roll, execution and return thereof were read in evidence without objection did not authorize the court to award equitable relief, as such evidence was not received for that purpose, but simply to show that the plaintiff was duly appointed receiver. No motion was made to amend the complaint, and it stands as it was drawn, a pleading in a strict action at law."

"The theory of the action as gathered from the complaint, the method of trial and the practice followed throughout the history of the case have fastened it unchangeably on the law side of the court. It was brought there and tried there, and there it must remain so far, at least, as this appeal is concerned." Judgment reversed.

In *McClung v. Foshour* (47 Hun, 421, 423; aff'd, 113 N. Y., 640), where plaintiff brought her action upon a complaint for money had and received by the defendants to the use of the plaintiff, and the proof showed instead that the money was paid in accordance with plaintiff's contract, the trial court found the contract to be invalid and permitted a recovery by plaintiff. Upon appeal this was reversed, the appellate court holding that the complaint should have been dismissed, and saying: "The recovery was upon an entirely different cause of action from that stated in the complaint, and inconsistent with it. The case discloses that it was an essential and necessary part of the plaintiff's case to show, and her evidence tended to show, that she made a contract with the defendants, and then, in pursuance of that contract, paid to the defendants the money she now seeks to recover, but that the contract was made, and its terms performed under such circum-

stances as amounted to a fraud on her. The plaintiff, having performed the contract, had no relief at law against her acts under it and acquiescence in it. It was necessary for her to avoid the legal effect of her own acts. Thus her complaint should have been in equity to procure relief against fraud or mistake, or both. When a plaintiff invokes equity, in order to establish an affirmative cause of action, he must set forth in his complaint the facts upon which he bases his claim to equitable relief."

In *Zoller vs. Kellogg* (66 Hun, 194, 197), where the complaint stated an action at law to recover damages for breach of a real property contract, it was held reversible error to permit on the trial an amendment changing the action to one for specific performance of such contract, the Court saying: "The case, as presented by the original complaint, was one for the recovery of money for an alleged breach of contract. The amendment was not one essential or material to that case. It was not necessary to enable the plaintiff to recover the money claimed, but rather to enable the plaintiff to recover on another kind of action in another case—'not the case to recover money, but a case for the performance of work.' In this view of the case, amended as not authorized by the section of the Code referred to, even if the evidence had been taken in the case and had disclosed real ground for equitable relief, the Court would not have been authorized, under the succeeding clause of Section 723, to so amend the pleading as to make it conform to the proof, because, by that clause of the section, an amendment can only be made 'when the amendment does not change substantially the claim or defense.' "



"Here the claim would be entirely changed from a claim for a money demand to that of the performance of labor in a specific performance of the contract."

In *Southwick v. First Nat. Bank* (84 N. Y., 420, 429), it is said by Earl, *J.* :

"Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. Here the defendant was brought into court to answer a complaint that he had violated his promise to apply the proceeds of the draft, and he took issue upon the alleged promise, and when he came to trial he was held liable, not for any breach of promise, but for the money paid by the Boston firm, on the ground of a conversion of the draft, or the mistake of facts which induced the payment of the money. The cause of action alleged was one held by the plaintiff, as assignee of F. P. Merriam, for the breach of the promise to pay the old draft owed by him. The cause of action for which the recovery was had was one which the plaintiff held, as assignee of J. N. Merriam & Co., for the recovery of the money paid by them upon the new draft."

"It is no answer to this objection that the defendant was probably not misled in its defense. A defendant may learn outside of the complaint what he is sued for and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is his right to have a complaint, to learn from that what

he is sued for and to insist that that shall state the cause of action which he is called upon to answer, and when a plaintiff fails to establish the cause of action alleged the defendant is not to be deprived of his objection to a recovery by any assumption or upon any speculation that he has not been injured."

In *Stevens v. New York* (84 N. Y., 296, 305), by Danforth, J., it is said: "But notwithstanding the liberality of the law which permits this construction, the plaintiff can have no relief that is not 'consistent with the case made by his complaint and embraced within the issue' (Code, § 275). He must, therefore, establish his allegations (*Salter v. Ham*, 31 N. Y., 321; *Bradley v. Aldrich*, 40 id., 504; *Heywood v. Buffalo*, 14 id., 540), and if they warrant legal relief only, he cannot have equitable relief upon the evidence. He must bring his case within the allegations as well as within the proof (*Bradley v. Aldrich*, 40 N. Y., 504; *Arnold v. Angell* 62 id., 508; *People's Bank v. Mitchell*, 73 id., 415)."

In *Hecla Powder Co. v. Hudson River Ore and Iron Co.* (7 Misc. 630, 631, aff'd, 152 N. Y., 619), where the cause pleaded was for damages for breach of a contract to use a certain make of powder and the proof and recovery were for goods sold and delivered, the Court on reversal says: "In *Romeyn v. Sickles*, 108 N. Y., 650, the Court of Appeals ruled that a pleading cannot be amended in a material respect, except at a time which will give the opposite party a right and an opportunity to meet by proof the new allegations against him saying: 'It is a fundamental rule that judgment shall be *secundum allegata et probata*, and any departure from that rule is certain to produce surprise, con-

fusion and injustice.' In *Reed v. McConnell*, 133 N. Y., 425, the judgment was reversed because the recovery was for a cause of action not exhibited by the complaint, and, adverting to the remedial policy of the reform Code, the Court says: 'But the rule that a party coming into court asserting one cause of action cannot recover on another and different one is unchanged. It is essential to the orderly administration of justice and the protection of the rights of litigants.' In *Douglass v. Ferris*, 138 N. Y., 192, it was held that a defendant cannot avail himself on appeal of a defense not pleaded, though apparent in the record, saying; 'It is not every fact that appears in the record that a party can have the benefit of in this court, but only such facts as have been pleaded and proven. *Secundum allegata et probata* is the rule that governs in such cases.'

"Respondent solicits us, by virtue of Section 723, of the Code, to conform his complaint to the proof, but the provision expressly qualifies the power of the Court by the conditions that the amendment does not change substantially the claim or defense.' *Romeyn v. Sickles*, 108 N. Y., 650."

The head note to *King v. Mackellar* (94 N. Y., 317), states an application of the rule, as follows: "Where a complaint alleged that plaintiff intrusted to defendant a sum of money upon his promising to invest the same for the former, but that he converted it to his use and refused to pay the same, *held*, that plaintiff, in the absence of any amendment of the complaint, was not entitled to recover, upon proof that defendant did in good faith invest the money, but negligently took insufficient security; that it was necessary to show either that defendant made no investment, or if he did in form, that it was not *bona fide*.

This rule requiring a recovery according to the allegations of the complaint has been frequently applied by the courts of other States. In *Burris v. Adams* (96 Cal., 664), where there was an alleged sale of land in probate proceedings by an administratrix, through an intermediary, to herself, the Court says:

“Appellant offered evidence to show that Adams purchased the property at the probate sale at the instance and for the use and benefit of the respondent, Mrs. McNeill, and that the deed afterwards made by Adams to said McNeill was in pursuance of a preconcerted arrangement between the two, by which she was to have the property. The court sustained an objection to the evidence on the ground that there was no averment in the complaint under which such evidence was admissible. We think this ruling of the court was right.

The complaint contains only the averments usually employed in an ordinary action to quiet title. Where the cause of action depends upon the proof of fraud, the facts constituting the fraud must be averred, and this rule has even been applied to defendants when the defense was of an affirmative nature (*Wetherly v. Straus*, 93 Cal., 1283). In the case at bar appellant was the moving party. He bought, or had transferred to him a lawsuit, and his only hope of winning it lay in the possibility of proving fraudulent acts, which he did not aver. He knew from the start that the respondent, McNeill, had a perfect legal title, which he could overthrow only by proving her guilty of a certain fraud; and he did not aver the fraud, even in general terms.”

In *Mosier v. Kersham*, 16 Col. App., 453, the headnote is as follows:

"In an action for an unsatisfied balance of a note after a foreclosure and sale under a deed of trust made to secure such note, evidence tending to impeach the *bona fides* of such sale is not admissible in defense unless the facts constituting such bad faith, misconduct or fraud are properly alleged in the answer."

In *McCracken v. Robinson*, 57 Fed. Rep., 375, 378, the Circuit Court of Appeals, by Wallace, J., says:

"Error is also assigned because of the exclusion of certain evidence offered by the defendants for the purpose of showing what representations were made to them prior to the execution of the construction contract, concerning the resources possessed by the railroad to enable it to perform its part of the contract, and to show that the defendants relied on these representations. There was no averment in the answer that the defendants were induced to enter into that contract by any misrepresentation, and the evidence was apparently offered only for the purpose of raising an issue, which was not tendered by the pleadings. We think it was properly excluded."

In *Mayer v. Texas Brewing Co.*, 26 S. W., 774, it is said:

"In such a case, when the claimant specially pleads the transfer from the debtor and the attaching creditor wishes to attack it upon the ground of fraud, he is required to make the issue by his pleadings."

*Clark v. Lindsay*, 7 Pa. Sup., 43, 47, 48, is a case where, under a lease reserving to the defendant lessor the absolute right to enter and make changes

and alterations, the plaintiff in his action for trespass against his lessor, introduced evidence, without having pleaded it, to show that such reservation was fraudulently inserted in the lease. This is held error, the Court saying:

“If his right of action depended on showing that the reservation was fraudulently inserted, the fraud should have been averred in the declaration, and the lease pleaded in accordance with his contention as to the terms actually agreed on. This is the settled rule where it is alleged that, by reason of fraud, accident, or mistake, a written instrument does not embody the real agreement.”

The text books are equally emphatic, in the statement of the rule requiring facts to be pleaded without which proof cannot be made, nor recovery had.

“A mere general allegation of fraud will not let in evidence of the facts constituting fraud, but the facts themselves must be alleged; and this rule has been applied even to defendants when the defense is of an affirmative nature.”

2 Abb. Trial Brief, Pl., 2d ed., p. 1462,  
§ 261.

“Facts set out in the complaint as constituting the fraud must be substantially proved on trial and other facts, though equally efficient in proving the fraud, are not competent.”

“Being an action *ex delicto*, it is not sustained by proof of damages resulting from breach of a contract.”

*Ibid.*, p. 1466, § 268.



“ A party cannot recover upon a cause of action however meritorious or however fully proved which is not alleged in his pleading, the rule being that a party must succeed *secundum allegata et probata* or not at all.”

*Ibid.*, p. 1708, § 147.

“ In actions for damages for breach of contract, the contract must be established as alleged, as well as its breach, and plaintiff cannot recover upon a different theory from that set forth in his pleadings; nor in a complaint in which a breach of contract is not alleged.”

*Ibid.*, p. 1712, § 149.

“ The reform legislation has not dispensed with the allegations of fact constituting a cause of action; on the contrary, it has made them, if possible, more necessary than under the old system. The converse of the rule above stated is also true. If the plaintiff sets forth a case entirely for legal relief, and prays a legal judgment alone, he cannot establish an equitable cause of action not pleaded, and recover an equitable remedy thereon.”

Pomeroy's Code Remedies, 4th ed., § 23, p. 39; also *Ibid.*, § 448, pp. 614-616, §§ 450-453, pp. 620-629; Moak's Van Santvoord's Pleadings, ed. of 1874, pp. 200, 205.

When the cause of action is based upon fraud, the facts constituting it must be pleaded and those pleaded must be proved, or the complaint will be dismissed.

In *Truesdell v. Bourke* (145 N. Y., 612, 617), the

Court of Appeals, by O'Brien, *J.*, says: "This action is based upon fraud, and the plaintiff, before he can recover, must prove the complaint or substitute another in its place (*Salisbury v. Howe*, 87 N. Y., 128). Where fraud is alleged as the basis of the action it must be proved. The law will not permit a recovery by proof of a right of action upon contract or of some other character, and this though facts may be stated or may appear which in proper form might sustain such an action (*De Graw v. Elmore*, 50 N. Y., 1; *Ross v. Mather*, 51 *Id.*, 108; *Barnes v. Quigley*, 59 *Id.*, 265)."

## (2.)

The rule applies in equity so that a judgment for legal relief merely on proof of facts warranting only such relief, cannot be had when the complaint sets out an equitable cause of action. Here, too, there must be a dismissal of the complaint for a failure of proof.

In *Truesdell v. Sarles* (104 N. Y., 164, 167), a judgment creditor's action in equity, the court says, by Danforth, *J.*: "Upon the issues formed by the pleadings the question was whether the evidence disclosed fraud either in fact or law sufficient as against Adeline Sarles to set aside the deed under which she claimed title. This was the only available ground of relief and the burden of proving it was on the plaintiff. It is hardly necessary to criticise the evidence, for the judgment of neither court follows the plaintiff's prayer, or the statement of his cause of action. It is therefore in violation of the well settled rule that no judgment can be given in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for mat-

ters not charged, although they may be apparent from some part of the pleading or evidence (*Rome Ex. B'k v. Eames*, 1 Keyes, 588; *Wright v. Delafield*, 25 N. Y., 266; *Southwick v. First Nat. Bank*, 84 *id.*, 420). ”

In *Arnold v. Angell* (62 N. Y., 508, 511, 512,) where the complaint alleged a partnership and prayed for a dissolution and an accounting, and the proof showed only a cause of action for money advanced, a judgment for the latter was reversed, the court, by Church, *Ch. J.*, saying; “The issues made by the pleadings were, whether a partnership existed and whether the defendant expressly or impliedly violated the terms of it, so as to entitle the plaintiff to a dissolution, and distribution of the assets. Where the issue of partnership was decided against the plaintiff, as it was, and we must assume correctly, the action was at an end, and the defendant was entitled to judgment.”

“It is an ancient rule in equity courts that the *allegata* and *probata* must correspond; and that, however full and convincing the proof of any essential fact may be, it is of no avail unless averred in the pleadinge.”

2 Abbott's Tr. Brief, Pleadings, 2nd ed.,  
§ 134, pp. 1688-1692, and cases cited.

“If, however, the complaint or petition contains a case entirely for equitable relief, stating no facts upon which a legal remedial right arises, and prays a judgment awarding the equitable relief alone, but on the trial the plaintiff fails to prove the case as thus alleged, but does establish a legal cause of action not averred in his pleading, his suit must be dismissed; he cannot recover the legal remedy ap-

propriate to the facts which he succeeds in proving."

Pomeroy's Code Remedies, 4th ed., § 23, p. 38, and cases cited.

(3.)

The first effort at an accounting in this action was made on May, 29th, 1902, and was tentatively allowed on the theory that the accounts might throw light upon the construction of the lease.

(Minutes, vol. 1, pp. 206, 317, 318, 319; vol. 2, p. 962.)

The second controversy over the effort at an accounting came up in December, 1904. The first effort, therefore, occurred more than two years after the commencement of this suit; and the second more than four years after the commencement of the suit; and the effort, still continuing, is now more than eight years after the commencement of this suit. The evidence shows that the plaintiff to this action had knowledge of the frauds it alleges, they in fact having occurred long prior to the commencement of this action. Hence:

#### POINT NINTH.

**Should this trial be permitted to result in a judgment in equity for amounts claimed to have been diverted by fraud from the uses of the plaintiff, as shown by the accounting actually had over the defendant's objections in this case, such a judgment would be invalid under a well established rule of equitable estoppel.**

The long period of delay is fatal to equitable relief under well established authorities.

Sheldon, etc., v. Eickmeyer, etc., 90 N. Y., 607, at 616, (where four years had elapsed.)

Kent v. Quicksilver Mining Co., 78 N. Y., 159, at 188.

Cook on Stock & Stockholders (1st Ed.)  
Sec. 686.

Snow v. Boston, etc., Co., 158 Mass., 325.

“In our view of the matter, a holder of common stock had an equitable right to restrain the privileged payment to a preferred stockholder from the profits of the company, and to have the contract therefore declared invalid. It was his duty to have been prompt in his application to the courts for that relief, before evil could fall upon innocent parties; and where application to the courts therefor has been delayed by his neglect, and advantages have been gained by the corporate body, assistance should be denied; (*Zabriskie v. Cleveland R. R. Co.*, 23 How. (U.S.), 395-398; *Erans v. Smallcombe*, 3 H. of L. Cas. (L. R.), 249). It is said that the common stockholders should have some time in which to seek relief. It is enough in answer to say, that four years at least went by before a holder of common stock asked for the aid of the courts, and then not until a holder of preferred stock asked that aid to restrain proposed corporate action meant to put the common stock upon an equality with his own.”

Kent v. Quicksilver Mining Co., *supra*, at 188.

“After a stockholder has knowledge, or is

chargeable with knowledge, of an *ultra vires*, fraudulent, or negligent act of the directors, he must institute his suit, if at all, within a reasonable time thereafter." (Cook, *supra*.)

Twin Lick Oil Co., v. Marbury, 91 U. S., 587.

Taylor v. South, etc., R'y. Co., 4 Woods, (U. S.), 575.

Story's Eq. Jur., Sec. 1539a.

Kitcher v. St. Louis, etc., R'y. Co., 69 Mo., 224.

Watt's Appeal, 78 Penn. St., 370.

Sheldon v. Eickmeyer, *supra*.

"So, also, if the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed, or money expended, or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred, \* \* and, in general, where it is clear that the stockholder had a full knowledge of all the essential facts of an act which he might bring his suit to remedy, but which, for an unreasonable length of time he fails to object to by a bill in equity, he will be held guilty of laches, and his right to institute the suit is barred.

Cook, *supra*.

"On the other hand, cases have occurred in which the utmost promptness has been required. Of these, instances may be found in those cases in which shareholders of companies have sought to repudiate their allotments and recover their money on the ground of misrepresentation, and in which the greatest vigilance and diligence have been exacted."

Bispham on Equity (4th Ed.) p. 324.



The cases are expository of the doctrine of *laches*. In deference to the multitude of investors in corporate securities, suits in equity to annul corporate action upon which volumes of securities have been issued and sold to third parties—dealt in over and over again—will not be entertained where the plaintiff has lain by with knowledge, instead of acting with the utmost promptitude.

Laches is negligence. A blunder is no excuse for negligence. Otherwise laches might be excused upon the ground that the party was ignorant of his duty to proceed with promptness.

Taking the wrong road is worse than not moving at all.

In respect to any motion to amend the complaint or any other effort at this time to change the form of action as set forth in the complaint from an action at law to an action in equity, it would be barred by the Statute of Limitations irrespective of the doctrine of equitable estoppel which prescribes a much narrower limitation of time.

#### POINT TENTH.

**The plaintiff, having introduced the defendant's books or a portion thereof, from which it fully appeared that the plaintiff had received the whole of the six millions set forth in the complaint, it cannot, in an action at law, be heard to impeach or discredit the books thus, by its own act, made evidence in its behalf.**

It is not, however, necessary to review the long

long line of authorities in support of this proposition, since it is entirely clear that:—

**The plaintiff, having so introduced the books, vouchers and records of the defendant, which, upon their face, show that the defendant expended every penny of the entire amount required by the lease, under the plaintiff's own construction thereof, to go to it in the work of construction from the defendant, it is not competent for the plaintiff to attempt to show by examination, analysis, expert opinions, deduction, criticism or argumentation, drawn from such books, vouchers and records, that they are in truth false, fraudulent and misleading, to a definite or indefinite extent, for such a course would obviously involve an accounting based upon allegations of fraud, not alleged in the complaint, and therefore in violation of the rule heretofore stated and supported by superabundant authority.**

Nothing could be more incomprehensible in law than the course this trial has taken. Coming into court with a short and simple complaint, asking for the recovery of two millions of dollars upon contract, the plaintiff has been permitted to avoid, in the first place, a determination of any of the issues of law or fact arising upon such contract, to plunge into an accounting at the outset, covering all the books, vouchers, checks and records, kept by both companies from the beginning, examine and analyze this documentary evidence in whole and in detail, sometimes as to amounts less than \$100, and sometimes as to amounts climbing into thou-

sands, for the purpose of showing that there had been conversions to its detriment in the conduct of the work involving millions and covering several years. To meet whatever charges or suggestions of charges such an extensive and wide spread investigation, might enable the plaintiff to make or to insinuate, the defendant has been compelled to make a like investigation into the books of both companies at a great expense for counsel and experts to dispel all the aspersions, manufactured and flung upon the conduct of its corporate affairs.

This studious and complicated work of examination and analysis of books, vouchers, records, checks and deeds of both corporations has occupied the attention and services of counsel and of experts for about six years almost continuously. It has been accompanied by charges made and charges dispelled, items exhumed and items exploded, crimination and recrimination; and this trial, thus in substance and effect, veritably an accounting in equity, based upon all manner of suspicions, insinuations and charges of fraud, false and fictitious bookkeeping, collusion and conspiracy between the respective corporations and their officers, each and all of which charges have ended in smoke, giving place to a perfectly clear, defensible and spotless record on the part of the defendant, has been conducted under a short and simple complaint, in an action at law for money on contract, which complaint served with an apology, contained not the slightest hint of wrong doing upon the part of any of the eminent and respectable citizens of Brooklyn constituting the officers of the defendant.

Surely, such a course of action should have no support in our courts of justice or among the right.

thinking members of our bar. The subscriber, at least, has had the satisfaction of fighting it inch by inch from the beginning.

#### POINT ELEVENTH.

**All the charges or suggestions made by the plaintiff of fraudulent or fictitious entries, of manipulation of the defendant's books, vouchers or accounts, by which moneys, due the plaintiff under the lease, were converted to the uses of the defendant, have been fully met, explained, and refuted by the evidence introduced in its behalf.**

This has been proven in whole and in detail.

(1.)

#### **Generally and as a Whole.**

The evidence conclusively establishes that, excluding every item of expenditure claimed by the plaintiff to have been for work done or materials furnished prior to February 14, 1893, the defendant expended subsequent to that date a sum in excess of the stock and bonds, amounting to \$6,000,000, mentioned in the lease.

Defendant's exhibits 1457, 1461, 1462, 1466 and 1468; Minutes, vol. 8, pp. 7251, 7256, 7257, 7304, 7311.

(2.)

**Specifically and in Detail.**

The charges are specified in detail by Professor Collin in his opening (Minutes, vol. 1, pp. 64, *et seq.*), and known in the evidence as journal entries. They are easily shown to be in each instance right and proper.

**Charges as Made by Professor Collin.**

(A.)

The item of \$90,000, being a portion of a dividend paid on January, 1893, and charged by a journal entry as part of the cost of the work of construction.

Minutes, vol. I., p. 64.

It appears that the defendant had issued an amount of stock equal to the principal, of which \$90,000, would be the interest at three per cent. In other words, three millions of stock had been issued by the defendant to raise the money necessary to the work of construction. The defendant, considering the money so raised and devoted to a purpose which, intrinsically, could render no profit or revenue for a long time to come, properly regarded it during the interval of non-productiveness in the nature of a loan; and that, therefore, in equity the construction account should be chargeable with the low rate of three per cent. upon such amount. It was so charged and it is confidently insisted that the act was true, fair and just. It is, besides, sufficient to add that the matter was fully considered by all the corporations in interest at the time of the adjustment and settlement by the

tripartite agreement and this appropriate charge was acknowledged and ratified by all.

(Yellow sheet, Minutes, vol. 6, p. 3452).

(B.)

As to the item of \$1,397.23, (*sic*) really \$137,797.03. This was an amount representing that portion of the salaries and expenses of the officers, clerks and counsel, shoeing of horses, light and heat, and use of cars for construction purposes, for work and services rendered in the conversion of the railroad from horse to electricity.

Minutes, vol. 1, pp. 64, 65.

The whole of the salaries and so forth, were first placed in the account of operations and thereafter the portion thereof going to the work of conversion in which they were quite constantly engaged, was transferred to the construction account. This was obviously just and proper, and the only criticism about it made by the plaintiff's counsel is that it related to a period between April 17, 1893, and June 6, 1893, a matter which has already been disposed of.

The entry was made to transfer to the cost of conversion and construction items which, in the first instance, were charged to operation accounts, being an adjustment of the accounts in accordance with the custom prevailing for upwards of twenty-five years.

Every item composing these charges is of the character authorized by the resolutions of December 27, 1893, which were adopted by both the plaintiff and the defendant. (Minutes, vol. , pp.



It was recognized at the time of the settlement and adjustment of the accounts between the plaintiff and defendant as a proper charge and it is no longer subject to controversy.

(C.)

As to the item of \$24,000 for carfares of employees engaged in construction.

(Minutes, vol. 1, p. 65).

No objection is made to the propriety of charging to construction the fares of the employees engaged in that work. The claim is that the amount is excessive, but no evidence to that effect has been given, except the statement that the amount paid by the plaintiff for fares of its own employees in the work of construction from June 6 to September was but \$3,000.

This in law is no proof at all.

(D.)

As to the claim that the proportion of the salaries of officers, clerks and directors, chargeable to construction,—namely, \$22,700—is excessive (Minutes, vol. 1, p. 65), and that the entire pay roll of officers, clerks and directors, (part of \$137,797.03, treated in paragraph B., *supra*) from February 1 to June 6, 1893, was only \$28,000, and for the period from April 17, 1893, to June 6, 1893, was only about \$12,500, and from June 6, 1893, still less; there is no proof whatever.

The statement is ambiguous and amounts only to an unfounded stigma. And it is easy to see that the officers and clerks of the company

may have been at one period almost wholly occupied with the work of construction and at another period much less occupied by such work.

(E.)

The charge that the directors of the defendant voted a thousand dollars to Mr. Bogardus, its secretary and treasurer, for extra services, rendered prior to June 6, 1893, is aptly illustrative of the recklessness and frivolty of the plaintiff's imputations (Minutes, vol. 1, p. 66). The case is replete with evidence that the services of Mr. Bogardus in the work of construction during the period mentioned were worth at least tenfold the compensation he was accorded, and that his compensation therefor was chargeable to the plaintiff has been already established.

(F.)

As to the item of \$27,619.67 of June 30, 1893, for interest on loans from October 13, 1892, to January 24, 1893.

(Minutes, vol. 1, p. 66.)

The defendant was in the habit of borrowing money to bear the current expenses of construction and at stated intervals to sell its bonds applicable thereto in comparatively large amounts, and out of the proceeds of such sales, to pay the principal and interest of these intermediate loans. This charge was especially authorized by the resolution of September 27, 1893, which was adopted by both the plaintiff and the defendant and appears in the Yellow Sheet, defendant's exhibit 56, and recognized

by the plaintiff as a proper charge. This was in conformity with the custom of railroad corporations engaged in like enterprises, and the interest upon these loans were chargeable to construction goes without saying. Besides, it made no considerable difference, since had the bonds been issued at the time of each individual loan, they would have carried the burden of the same rate of interest. The assumption of Mr. Collin that this item of interest was charged to the particular six million dollars, which he claims to be due to the plaintiff under the lease after June 6, 1893, is unfounded in law and fact.

(G.)

The same answer applies to the item of interest on loans from October, 1892, to January, 1893.

(Minutes, vol. 1, pp. 69, 70.)

(H.)

As to the item of \$10,000, a journal entry of February 28, 1894.

(Minutes, vol. 1, pp. 69, 70.)

In respect to the item of \$10,000 arising from the sale of unused real estate, mentioned by Mr. Collin, it is sufficient to say that no proof has been offered by the plaintiff requiring the attention of the defendant.

(I.)

As to the item of \$123,000 (correctly \$134,000) charged to construction from the supply account by a journal entry made on March 31, 1894.

(Minutes, vol. 1, pp. 69, 70.)

Here again the Professor is laboring under much confusion. The evidence shows that in the transfer of possession on June 6, 1893, the defendant charged against the plaintiff \$251,000 for material and supplies on hand without objection thereto. Thereafter it was ascertained that there were unmounted motors on hand, not yet put in use, costing and paid for by the defendant the amount of \$150,000, and clearly chargeable against the plaintiff under the terms of the lease for construction.

(See lease § XI, Minutes, vol. 8, 7061-7068.)

They were, therefore, subsequently rightfully entered to that account. There were also \$134,000, not \$123,000, as stated by the Professor, of materials and supplies on hand, but not put in use or in the body of construction on February 14, 1893, which on June 6, 1893, were no longer on hand, and presumably had gone into the body of the work. This amount, therefore, was rightfully charged against the plaintiff under the terms of the lease.

(*Ibid.*)

This adjustment of the accounts was likewise ratified and approved by the conference between the officers of the companies in 1894 and the tripartite agreement.

(J.)

As to the item of \$46,454.02, which, it is said, was charged as a part of the operating expenses of the defendant before June 6, 1893, and is charged as a part of the obligation to expend the six million dollars for conversion.

(Minutes, vol. 1, p. 71.)

This is a total blunder by the Professor. The fact, as the evidence shows, is that the \$46,454.02 was reported by the plaintiff to the defendant as having been paid out of moneys advanced by the defendant for construction work, the amount having been incurred by the defendant for operating expenses, etc., in its own behalf. Whereupon the defendant charged the amount to operating expenses against itself and withdrew it from the charges against the six million dollar fund.

(K.)

As to the item of \$5,993 which it is said, was never received (Minutes, vol. 1, p. 71.)

The Professor is blind as to meaning in regard to this item and no proof having been offered, it may safely be treated as a dream.

(L.)

As to the item of \$25,000, which is said to represent moneys advanced from the sale of real estate, one of the funds from which they were to expend money for conversion, which said \$25,000, was charged as a part of this six million fund (Minutes, vol. 1, pp. 71, 72.)

It is not true that this \$25,000 is charged as part of the six million dollar fund; nor is there any evidence of it. On the contrary, it was advanced to the plaintiff in addition to the \$6,000,000.

(M.)

As to the items of notes, which we gave to them for moneys borrowed "and which we afterwards

paid are charged against us, \$350,000 and \$324,000, without deducting the credit."

(Minutes, vol. 1, p. 72.)

It need only be said that this statement of the Professor is totally incomprehensible and no light thereon can be borrowed from the evidence.

Thus the amounts claimed by Professor Collin, to have been diverted from the plaintiff by false and fictitious entries upon the books of the defendant and aggregating, as stated by Professor Collin, the sum of \$600,000 (Minutes, vol. 1, pp. 75, 63, 64), are wholly explained and justified by the defendant.

(3.)

*In the course of the protracted trial the items of amounts alleged to have been diverted from the plaintiff or converted to the defendant by false entries and the manipulation of books came to be known as journal entries, more definite in character and with a wider range than those described in the opening of Professor Collin.*

These amounts will now likewise be examined in detail so as to demonstrate, the falsity of the charges or imputations and to establish their verity and fairness. They are seven in number. (1) \$137,799.03, adjustment of operating expenses; (2) \$24,000, car fares of employees engaged in construction work; (3) \$90,000, equivalent to interest on money borrowed for construction purposes; (4) \$56,724.94, being interest on money borrowed to pay current expenses in the work of construction in anticipation of bond sales; and (5) \$285,020.85,



amounts transferred from material and supply account, have been treated and disposed of in the reply to the opening of Professor Collin containing the same matter.

There remain only two of the so-called journal entries: (1) \$80,000 for generators; and (2) \$41,655.41 for interest on the surplus loaned or advanced to the plaintiff during the period of such loan.

FIRST: As to generators.

There was a great number of generators to be used in the power houses, for the manufacture of electricity, purchased and delivered from the General Electric Company of Schenectady, New York. The evidence does not disclose the date of delivery or the date when the generators, covered by the two payments in question, aggregating \$80,000, were put in use or became a part of the actual body of the railroad constructed under the lease. In this particular, plaintiff is content to rest upon an inference, drawn from the general circumstances of payment and delivery of generators from the General Electric Company, that the generators covered by these two payments, aggregating \$80,000, were delivered prior to June 6, 1893.

(Minutes, vol. 1, p. 327; vol. 5, pp. 2535, 2536, 2548).

In short, it is a minor branch of the plaintiff's contention that it was entitled to the six million dollar fund after June 6, 1893, irrespective of the expenditures for work done or material furnished between February 14, 1893, and that date. The item, therefore, falls within the principal contention of this case. It must also be borne in mind that, ma-

terial delivered prior to February 14, 1893, but not then put in use in the body of the railroad, was to be treated as cash chargeable to the plaintiff. (Lease, § XI.) Besides, the dates of payment to the General Electric Company shed no light whatever as to the time of the delivery of any part of the generators, since they were payments on account generally.

SECOND: As to the item \$41,655.41.

The evidence shows that the balance of the surplus, amounting to \$582,000, belonging to the defendant under the lease, had been advanced for the completion of the work of construction. This fact was stated, investigated and established by the representatives of all three companies who were parties to the tripartite agreement. The item of \$41,655.41 was the interest due on the moneys so advanced by the defendant to the plaintiff for the period of its use and this interest as well as the principal was ascertained and acknowledged by the payment and satisfaction had under the tripartite agreement.

After the foregoing abortive attempts at proof of fraud had gone their short life of introduction and had faded away under examination into the chaos from which they originated, Mr. Severance, impelled by desperation, in his opening before Judge Herrick, furnished the record of the trial of this simple action for moneys due on contract with the following gem of reckless imagination in furtherance of the effort at a judgment in equity upon the ground of fraud:

“The question may occur to your Honor, if they  
“have not expended this money, what have they  
“done with it? We have introduced evidence

“already to show that a series of extra dividends  
 “have been paid by the Brooklyn City Company  
 “to its stockholders that aggregate somewhere, if  
 “my recollection serves me, between \$1,100,000 and  
 “\$1,200,000. They have paid those extra divi-  
 “dends since the time the Brooklyn Heights Com-  
 “pany took possession of this property, and there  
 “was no way for them to get this money except  
 “by withholding it from the plaintiff out of the  
 “proceeds of the sale of the stock and bonds in  
 “controversy.”

(Minutes, vol. 5, p. 2624.)

It may be said, with regret for the plaintiff's learned counsel, that, apart from the item of \$90,000, miscalled a dividend and paid in way of interest at the rate of three per cent. for one year on moneys advanced by the defendant to the work of construction, it is now clearly and indubitably established by proof that not one penny of extra dividend has ever been declared or paid by the Brooklyn City Railroad Company to its stockholders or “to themselves out of the proceeds of the sale of the stocks and bonds in controversy.”

No extra dividend of any kind whatever was declared or paid by the defendant from February 14, 1893, the date of the lease, down to March, 1894. On March 8, 1894, an extra dividend of \$240,000 was declared and paid by the defendant out of its surplus. On July 11, 1895, an extra dividend of \$300,000 was declared and paid out of its Surplus. On January 10, 1899, an extra dividend of \$120,000 was declared and paid out of its Surplus. These are all the extra dividends declared or paid by the defendant company since the

date of the lease to the present time. They aggregate in amount the sum of \$660,000.

The surplus is reserved to the defendant most absolutely by the terms of the lease (lease, § IV). At the date of the making of the lease the evidence shows that the surplus amounted to upwards of \$700,000.

(Minutes, vol. 8, p. 7251; defendant's exhibit, 1457.)

In the conferences between the plaintiff and the defendant and their associates, leading up to the tripartite agreement, the surplus of the defendant, after deducting the dividend paid to the stockholders for the period from February 14, 1893, to June 6, 1893, and also the extra dividend paid March 8, 1894, was ascertained and adjudged to be \$582,000 (Yellow sheet, defendant's Exhibit 56, Minutes, vol. 6, p. 3452.) Out of this remaining surplus was paid the two following dividends, namely, that of July, 1895, and that of January, 1899, leaving at the present time a surplus of \$162,000. In view of the fact that all the expenses of the defendant are provided to be paid by the plaintiff under the terms of the lease, it will be obvious that the distribution of this surplus by the defendant among its stockholders was just, wise, prudent and in all respects right.

While it was not competent for the plaintiff or its counsel to make the charges of fraud or to seek a judgment thereon in the action at law which they have brought, without any allegation of fraud in the complaint, yet the charges having been made and the truth thereof having been attempted to be established, however, abortively, in the evidence, it was deemed due to the high and solid character of the officers and directors of the defendant to explain and annihilate them.

## POINT TWELFTH.

**The plaintiff was not at the date of the commencement of this action and is not now the owner of the claim or cause of action set forth in the complaint.**

(a) On the 1st day of August, 1894, plaintiff and the Long Island Traction Company made, executed and delivered to the New York Guaranty & Indemnity Company, as Trustee, a mortgage to secure an issue of collateral trust notes. The granting clause of this mortgage reads as follows:

“Now, therefore, the Traction Company and the Heights Company, in consideration of the sum of one dollar to each of them in hand paid by the Trustee, the receipt whereof is by each hereby acknowledged, and in order to secure equally the payment of the principal of the notes aforesaid at any time outstanding, do hereby severally and respectively grant, bargain, sell, assign, transfer, set over and deliver to the Trustee and its successor, and do hereby pledge and hypothecate simultaneously with the execution of these presents the following described personal property, that is to say:”

Then follows a description of the personal property sold, assigned and transferred, among other things, as follows:

(1) All the right, title and interest of the Long Island Traction Company in the entire capital stock of the Heights Company.

(2) All net profits of or in any wise derived or received by said Heights Company as lessee of the

property of the Brooklyn City Railroad Company under the lease of February 14, 1893, including all the present and future right, title and interest of the Heights Company and the Traction Company in the guarantee fund of \$4,000,000.

(3) All the right, title and interest of the Heights Company in and to the amount of the cost of all property, extensions, branches, additions, improvements and equipments heretofore and hereafter made, acquired and paid for by said Heights Company out of its own funds for use in connection with the operations of the railroads of the Brooklyn City Railroad Company, less the cost of such parts thereof as shall or may be required to preserve said railroads, extensions, branches, additions, improvements and equipments in good repair and serviceable condition during the lease hereinabove mentioned from the said Brooklyn City Railroad Company as lessor to said Heights Company as lessee, less the cost of such part thereof as shall or may be necessary to preserve and secure efficiency in the operation of such railroad: such cost, as aforesaid, being payable under the terms of the lease above mentioned by said lessor company to said lessee company, in the event of the expiration of said lease or other sooner termination. (Minutes, vol. 6, pp. 3623-3627; Defendant's Exhibit 58.)

By a decree of the Circuit Court of the United States for the Eastern District of Virginia, bearing date October 11, 1895, in an action brought by the New York Guaranty & Indemnity Company against the Long Island Traction Company and the Brooklyn Heights Railroad Company, the mortgage of August 1st, 1894, was foreclosed, the rights, franchises and property covered and described in the



mortgage were adjudged to be sold at public auction to the highest bidder, and F. Kingsbury Curtis, Esq., was appointed Special Master to execute this decree and authorized to execute and deliver to the purchaser or purchasers of the property sold a bill of sale or other instrument of assignment or transfer. (Minutes, vol. 6, p. 3645.)

The decree further provides that the purchaser or purchasers of the property shall be invested with and hold possession of and enjoy the said property decreed to be sold, and all the rights, privileges and franchises appertaining thereto as fully and completely as the said Long Island Traction Company and the Brooklyn Heights Railroad Company now hold and enjoy or have heretofore held and enjoyed the same under their charter. (Minutes, decree, vol. 6, pp. 3627-3647.)

F. Kingsbury Curtis, as Special Master under the foregoing decree, sold the property described therein to John G. Jenkins, on the 13th day of December, 1895, for the sum of \$5,500,000, and by an indenture made the 24th of December, 1895, which, after reciting the purchase by Jenkins and the confirmation of the sale by decree made the 24th of December, 1895, grants, bargains, sells, assigns, etc., all the rights, franchises and property covered by the trust indenture of August 1st, 1894 described in the decree and the trust indenture (Minutes, vol. 6, pp. 3604-3609.)

On the 24th of December, 1895, Jenkins, the purchaser under the decree of foreclosure, by an indenture of that date sold the property purchased by him from Curtis, the Special Master, to Fred erick P. Olcott, Roswell P. Flower, Anthony N Brady, John G. Jenkins, George W. Young, Mar

shall J. Driggs and Alfred J. Pouch, who were described as composing the Reorganization Committee of the Long Island Traction Company. This indenture recites the purchase by Jenkins at a sale conducted under and pursuant to the decree and the confirmation of the same, and the receipt by Jenkins of deeds of transfer and assignment of the property sold from the New York Guaranty & Indemnity Company, the Brooklyn Heights Railroad Company, the Long Island Traction Company, and Horace J. Morse, Receiver of the Long Island Traction Company, and F. Kingsbury Curtis, as Special Master, and the receipt of 1,970 shares of the capital stock of the Brooklyn Heights Company, and options to purchase the 13 shares qualifying the directors of the Brooklyn Heights Railroad Company, and that his purchase was made on behalf and for the benefit of the Reorganization Committee, party of the second part, who supplied to him the securities and money necessary to complete his purchase, and sells, assigns, conveys, releases, transfers and delivers to the Reorganization Committee all property covered by the trust indenture and described in the decree of October 11th, 1895 (Minutes, vol. 6, pp. 3609-3614.)

By an indenture bearing date the 24th day of January, 1896, between the Reorganization Committee, who had received the transfer from Jenkins, and the Brooklyn Rapid Transit Company, the Reorganization Committee sold, assigned, transferred, conveyed and agreed to pay over to the Brooklyn Rapid Transit Company, called in the indenture the Transit Company, all the property covered by said trust indenture of August 1st, 1894, and "also all the property purchased by John G. Jenkins for said Committee at a Master's Sale made on December 13th, 1895, by virtue of a de-

cree of the Circuit Court of the United States, in and for the Eastern District of Virginia, in an action in which the New York Guaranty & Indemnity Company was plaintiff and the Long Island Traction Company and others were defendants, and which property was, in pursuance of a decree of said Court confirming said sale, duly transferred and conveyed by said Master and by said Long Island Traction Company and Brooklyn Heights Railroad Company to said John G. Jenkins, and by said John G. Jenkins duly conveyed to said F. P. Olcott, Chairman, for the purpose of vesting the right, title and interest thereby acquired by said Jenkins in said Committee." (Minutes, vol. 6, pp. 3614-3622.)

The effect of the foreclosure of the mortgage and the sale under the decree of October 11th, 1895, and these various conveyances above recited, was to vest in the Brooklyn Rapid Transit Company all the right, title and interest of the Heights Company in and to the amount of the cost of all property, extensions, branches, additions, improvements and equipments made, acquired and paid for by said Heights Company out of its funds for use in connection with the operations of the railroads of the Brooklyn City Railroad Company. It covered all claims and demands which the Heights Company on August 1st, 1894, the date of the collateral trust mortgage, had or might thereafter have against the Brooklyn City Railroad Company on account of such cost.

The only words of exclusion or exception in the grant to the New York Guaranty & Indemnity Company, as Trustee, is "the cost of such part thereof as shall or may be required to preserve said railroad extensions, branches, additions, improvements

and equipments in good repair and serviceable condition during the existence of the lease hereinbefore mentioned from said Brooklyn City Railroad Company, as lessor, to said Heights Company, as lessee, less the cost of such part thereof as shall or may be necessary to preserve and secure efficiency in the operation of such railroad."

The concluding words or phrase of the description of the property granted by the mortgage indenture to the New York Guaranty and Indemnity Company, namely, "such cost, as aforesaid, being payable under the terms of the lease above mentioned by said lessor company in the event of the expiration of said lease or other sooner termination thereof" are not words of qualification or limitation, but are mere statements as to when the entire cost would become due and payable.

The claim in this action is for moneys expended by the plaintiff in the payment of the cost described in the mortgage of August 1st, 1894, and in the decree of foreclosure and in the various indentures and transfers above mentioned as being sold and assigned. (Vol. 8, pp. 7496-7506.)

This claim is personal property and the mortgagee actually transferred this claim and property to the mortgagee and the purchaser on the foreclosure sale, of course, acquired an absolute title thereto. The effect of a chattel mortgage, in transferring title, has been well stated by Brantly, in his treatise on Personal Property, at page 340, § 228: "A mortgage of chattels, like a mortgage of land at common law, is, in its true form an absolute conveyance of the property with a condition of defeasance. It is a sale upon a condition subsequent. The mortgagee acquires a present title, liable to be divested by the

payment of the debt by the mortgagor. Upon breach of the condition the title of the mortgagee is absolute at law, but the mortgagor has an equity of redemption."

Stoddard v. Denison, 38 How. Pr., 296, 301.

Charter v. Stevens, 3 Denio, 33.

Kimball v. F. M. Nat. Bk., 138 N. Y. 500, 504.

Darrow v. Wendelstadt, 43 App. Div. 426.

"A mortgage of personal chattels is a sale on condition."

"The legal title to the chattel is vested in the mortgagee, subject to the right of the mortgagor to perform the condition."

Stoddard v. Denison, *supra*.

(b.) Assuming for the sake of the argument, that the amount of cost expended by the lessee out of its own funds, sold, assigned and transferred to the Guaranty and Indemnity Company by the trust indenture of August 1st, 1894, and purchased by Jenkins in 1895 upon the foreclosure of that mortgage, transferred by him to the Organization Committee and by that Committee to the Brooklyn Rapid Transit Railroad, is to be limited to costs paid by the lessee out of its own funds payable at the termination of the lease, it is clear that the claim in suit is moneys expended by the lessee after the exhaustion of the \$6,000,000 fund, the proceeds of the \$3,000,000 of stock and \$3,000,000 of bonds mentioned in the lease.

As early as March 20th, 1894, Mr. Bogardus, General Manager of the Heights Company, reported that

the company would require on account of construction the sum of \$707,128.72 and that the Brooklyn City funds for this purpose were about exhausted. (Minutes, vol. 6, p. 3182.)

Again in the circular of September 15th, 1894, signed by all the Directors of the Heights Company, there is the following distinct admission:

“Besides disbursing the moneys from the sale of increased capital stock and of the consolidated bonds of the Brooklyn City Company, the Heights Company had expended out of its own funds a sum exceeding \$1,000,000 and will be required to expend before the electrical conversion is completed a large additional amount.”

When to these direct admissions is added the positive testimony of Mr. Lewis, Mr. Merritt, Mr. Legget and Mr. Forsdick as to the expenditure of the \$6,000,000 fund, and the undisputed fact that the Heights Company reported to the Railroad Commissioners its expenditures on the Brooklyn City system for the years ended June 30th, 1896, 1897, 1898 and 1899 as the property of the Brooklyn Rapid Transit Company and as payable at the termination of the lease, which sums so reported included the amount of plaintiff's claim in this action, there is no room to question that this claim, if payable at all to the plaintiff, is so payable under Section X of the lease, at its termination. And when to the foregoing convincing evidence and admissions is added the positive evidence of the reports made by the Brooklyn Rapid Transit Railroad Company to the Stock Exchange on its application for the listing of its bonds (Exhibits 1453-1456, Minutes, vol. 8, pp. 7245-7246) that an amount which includes the amount sued for in this action



was due at the termination of the lease, there can be no question but that the claim in suit was included in the property conveyed by the Trust Indenture of August 1st, 1894, which was foreclosed under the Decree of October 11th, 1895, and passed by assignment by the purchaser to the Reorganization Committee of that Company and by its assignment ownership of the claim was vested in the Brooklyn Rapid Transit Company and so passed by the mortgage of October 1st, 1895, under the mortgage of the Brooklyn Rapid Transit Company to the Central Trust Company.

(c) Independent, however, of the foregoing considerations, the evidence is positive and convincing that the plaintiff was not at the date of the commencement of the action and is not now the owner of the claim and demand sued upon, no matter when that claim may become due and payable.

By an agreement made and entered into on the 24th day of March, 1896, between the Brooklyn Rapid Transit Company, called the Transit Company, party of the first part, and the Brooklyn Heights Railroad Company, called the Heights Company, party of the second part, it is recited in substance and effect as follows:

The execution by the Heights Company and the Traction Company of the mortgage of certain of their properties to secure their joint and collateral trust notes for the principal amount of \$1,875,000, the proceeds of which notes were received and paid out for the benefit of the Heights Company. The collateral trust notes were paid by a foreclosure sale in one parcel of the property so pledged and mortgaged, without an adjustment of the respective proportions of said indebtedness, which said

two companies may deem to have paid. The Traction Company and the Heights Company have heretofore jointly executed certain promissory notes upon which there was at the time of the foreclosure and sale a total principal indebtedness of \$606,432.33, which was paid out of the amount bid on such sale of the joint properties of the two companies so mortgaged. The Transit Company claims and demands that said obligations were paid in part by the property of the Traction Company, and that the Heights Company is justly and equitably indebted to the Transit Company in an amount equal to the proportion of said indebtedness, which may fairly be deemed to have been paid by such sale of property of the Traction Company, and demands of the Heights Company a settlement and adjustment of the amount of such claim.

The agreement then provides that the Heights Company shall pay the Transit Company five per cent. per annum upon such total amount of said obligations as is estimated to have been expended for construction and betterments, which amount is hereby fixed and agreed upon as being the sum of \$2,237,897.35 on January 1st, 1896; said interest to be paid until the termination of the lease by the Brooklyn City Railroad Company of its railroad system to the Brooklyn Heights Railroad Company, which lease bears date February 14th, 1893. The Transit Company releases the Heights Company from any obligation to pay any part of such principal amount and accepts such agreement to pay interest, in full satisfaction of all its claims and demands by reason of the transactions herein set forth.

The agreement then provides that such amount as may hereafter be advanced by the Transit Com-

pany to the Heights Company or paid out and expended by the Transit Company for the Heights Company should be expended under the supervision of a joint committee of the two companies, and so much of the principal of said moneys so advanced and expended as shall be expended for betterments and improvements and as in the judgment of such joint committee should be proper charges therefor on the books of the Heights Company against the Brooklyn City Company, shall not be repaid by the Heights Company to the Transit Company, but the Heights Company shall pay the interest thereon semi-annually at the rate of five per cent. per annum until the termination of said lease from the Brooklyn City Railroad Company to the Heights Company.

The Heights Company shall continue to keep an accurate account of all expenditures for betterments and construction which are a proper charge against its lessor, the Brooklyn City Railroad Company, and to give access to the same at all reasonable times to the Transit Company or its properly accredited officers or agents, and shall also by proper entry on its books of account recognize the *ownership* of the Transit Company in said construction account so that in the event of any termination of said lease, the amount of such claim against the Brooklyn City Railroad Company shall correctly appear and be readily ascertainable, and the equitable interest of the Transit Company therein shall appear upon the books of the Heights Company.

The provision in the above mentioned agreement providing that the Brooklyn Heights Railroad Company should make an entry in its books showing the ownership by the Transit Company of the Brooklyn City Railroad Company construction ac-

count on the Height's Company's books was carried out by an entry made on those books under the date of January 1st, 1896, crediting the Transit Company \$2,237,897.35, and forming part of the entry is a statement signed by C. A. Collin, counsel, Charles D. Meneely, auditor, and William A. Barnaby, chief accountant, stating that by virtue of an agreement dated March 24th, 1896, between the Brooklyn Rapid Transit Company and the Brooklyn Heights Railroad Company, adjusting all mutual claims between said companies, the Brooklyn Rapid Transit Company is credited under date, of January 1st, 1896, "with \$2,237,897.35 which, under the above agreement, is the sum fixed and agreed upon as the total amount of the construction and betterment of the Brooklyn Heights Railroad Company against the Brooklyn City Railroad Company at the above date." (See "Entry Sheet, Sundry Ledgers," p. 182.)

The legal effect of this entry and statement was to vest in the Brooklyn Rapid Transit Company the ownership of the entire amount expended by the Brooklyn Heights Company for betterments and construction of the Brooklyn City Railroad up to January 1st, 1896.

The evidence of Mr. Forsdick, the accountant for the defendant, shows that this sum of \$2,237,897.35 includes the amount of the items in disbursing committee certificates (Plaintiff's Exhibits 1119-1161, note of \$308,304.35 given by the Heights and Traction Companies to the Brooklyn City Railroad Company, and the debit balance of \$1,059,543.34 of June 30th, 1894.) (Vol. 8, pp. 7395-7398; see also Defendant's Exhibit 1470.)

The plaintiff has given no evidence and introduc-

ed no vouchers showing an expenditure by it on account of the conversion, improvement or betterment of the Brooklyn City Railroad system subsequent to January 1st, 1896, at which date it is conceded that its total expenditures on such accounts were \$2,237,897.35, and that any claim that it had for such expenditures, was the property of the Brooklyn Rapid Transit Company.

(d) The transfer of the Brooklyn City construction account from the Heights to the Transit Company was, as is apparent from the evidence, in consideration of the fact that it was the property of the Traction Company, sold under the decree of foreclosure which paid the obligations, the proceeds of which furnished the Heights Company with the means to make the expenditures on the leased properties.

It is entirely unimportant, therefore, whether or not the cost of converting the demised railroad mentioned in the mortgage be payable at once or at the termination of the lease, as, whenever payable, the Transit Company, not the Heights Company, owns it. This ownership of the Transit Company, however, is, of course, subject to the mortgages of such cost executed by it to the Central Trust Company. (Defendant's Exhibits 1446, 1464.)

The first of these mortgages bears date the first day of October, 1895, and was made to secure an issue of bonds of the par value of \$7,000,000, all of which it is conceded are issued and outstanding, and by the terms thereof the Transit Company bargains, sells, assigns, transfers, etc., to the Central Trust Company, as Trustee, the entire capital stock of the Brooklyn Heights Company and all the right, title and interest of the Transit Company in and to

the amount of the cost of the property, extensions, branches, additions, improvements and equipment heretofore and hereafter made and acquired and paid for by the Brooklyn Heights Railroad Company or said Transit Company out of their own funds, for use in connection with the operation of the railroads of the Brooklyn City Railroad Company, etc., etc., as in the mortgage to the New York Guaranty & Indemnity Company above quoted.

The second of these mortgages (Defendant's Exhibit 1464), dated July 1st, 1902, bargains, sells, assigns, transfers, etc., to the Central Trust Company, as aforesaid, the entire capital stock of the Brooklyn Heights Railroad Company and "all the net profits of or in any wise derived or receivable by the Brooklyn Heights Railroad Company, lessee under lease dated February 14th, 1893, by the Brooklyn City Railroad Company, lessor of all the railroads, franchises and other property thereby demised of said lessor company, and also all other income of the Brooklyn Heights Railroad Company under said lease, after discharging its obligation under the said lease"; also "all the right, title and interest heretofore acquired and now owned or hereafter acquired out of the proceeds of the bonds issued hereunder by the Transit Company in and to the amount of the cost of all property, extensions, branches, additions, improvements and equipments heretofore or hereafter acquired for use in connection with the operation of the railroads of the \* \* Brooklyn City Railroad \* pursuant to and subject to the terms of leases or contracts heretofore or hereafter made between any two or more of said corporations." This mortgage was made to secure an issue of bonds of the par value of \$150,000,000. (Section 1, p. 15), and was made subject to the mortgage of October 1st, 1895, above mentioned.



It is conceded that bonds of the par value of \$25,000,000 have been issued and outstanding under this mortgage.

By the mortgage of October 1st, 1895, the Central Trust Company acquired the legal title to the claims of the Heights Company under its construction account against the Brooklyn City Railroad Company, amounting to \$2,237,897.35, as of the date of January 1st, 1896, the ownership of which account was in the Brooklyn Rapid Transit Company.

Subsequent to January 1st, 1896, the Heights Company made charges against the Brooklyn City Railroad Company on account of construction of improvements and betterments on its lines in accounts headed "Brooklyn City Construction Accounts." The practice was, as shown by the evidence, for the Heights Company to render bills to the Transit Company for the cost, etc., etc., by it on the Brooklyn City line, and for the Transit Company to pay the amount of these bills on certificates presented by the Heights Company, which payments were receipted for by the Heights Company and credited to the Transit Company in an account on its books headed "Brooklyn Rapid Transit Equity in Brooklyn City Construction Account," the word "Equity" being used probably because of the mortgage to the Central Trust Company of October 1st, 1895.

## POINT THIRTEENTH.

**No action lies under the provisions of Section V. of the lease or any other of its provisions for the expenditure of moneys by the lessor out of the proceeds of the \$3,000,000 of stock and \$3,000,000 of bonds in the lease mentioned, until after a request by the lessee upon the lessor to make such expenditure and the submission to the lessor of a statement of the cost of conversion for which the expenditure is to be made.**

(a) Section V of the lease, the article upon which this action is based, provides as follows:

“The lessor further covenants and agrees to issue three million dollars (\$3,000,000) of its capital stock now unissued, but authorized to be issued, within six months after the delivery of this lease, and to sell and dispose of the same at par, and also to issue three million dollars (\$3,000,000) of its bonds, now unissued, but authorized to be issued, which said bonds shall be issued from time to time, as requested by said lessee, and shall be sold or disposed of for the highest price bid or offered therefor, and the proceeds of said stock and bonds, less any premium realized or received on the sale of the said bonds, shall be expended by the lessor in payment, at the request of the lessee, from time to time of the cost of converting the railroads of the lessor into an electric railroad or into any other kind of railroad authorized by law, which shall be approved of by the lessor and lessee, and if all of such proceeds be not required for such pur-

pose, then any balance shall be expended by the lessor in payment as aforesaid of the cost of such additions, improvements, extensions, branches and equipments to the said railroads and properties of the lessor as in its judgment and in that of the lessee shall be necessary or advantageous to the property of the lessor or the interest of the lessee, other than those necessary to keep the said railroads and properties in good condition and repair, and other than those necessary to preserve or secure efficiency in the operation of said railroad or railroads, and it is agreed that all expenses incident to the issue, sale and disposition of said stock and bonds shall be borne and paid by said lessee."

The lessor's undertaking to expend any portion of the proceeds of either the stock or the bonds, is expressly conditioned upon the request of the lessee, and, by the express terms of the article, the obligation to expend anything is limited to the payment of the cost of conversion of the railroad, etc., etc. The road being in the custody of the lessee and the lessee being engaged in the work of conversion, the lessor could not expend money in the payment of such cost in the absence of a statement thereof by the lessee and a request for the expenditure by the lessor of the amount of such cost. There was, therefore, not only an expressed condition to the obligation to expend moneys that there should be a request by the lessee, but also in the very nature of the case a statement of the amount of the cost for which the expenditure should be made, must be presented to the lessor before its obligation to make the expenditure could become absolute so as to create a default on the part of the lessor in case there was no compliance with the

request. No definite time is fixed by the article for making the expenditures by the lessor. Therefore, there could not be any default by the lessor either as to the time of making or as to the amount of the expenditure to be made by it until after a request or demand by the lessee and a statement of the amount of cost of conversion for which the expenditure was to be made.

The general rule of law upon the subject of agreements to pay money, expressly conditioned upon a request, is stated in *Lawson on Contracts*, 1st ed., (Sec. 409, p. 444) as follows:

“The promise may be conditional upon a request or demand of performance; the making of the request or demand is then necessary to render the contract absolute, and in an action for a breach of the contract, must be alleged and proved.”

Also, the same rule is similarly stated in 9 *Cyc. of Law and Procedure*, at p. 616:

“A contract may be conditioned upon a request or demand of performance. The making of the request or demand is then necessary to render the contract absolute, and in an action for a breach of the contract it must be alleged and proved.”

Leake, in his “*Law of Contracts*,” (4th edition), says (p. 451):

“A promise may be conditioned upon a request or demand of performance; which must then be alleged and proved in an action for a breach.”

He then refers to the doctrine that a present

debt of a fixed amount is payable without demand, and continues (p. 452):

“In the case of a debt of uncertain amount to be ascertained by reference to matters better known to the creditor than the debtor, a demand of the amount must be made before it can be considered due, because the debtor cannot otherwise know the amount.”

For this doctrine Mr. Leake cites the case of *Brown v. Ft. East. Ry. Co.*, 2 Q. B. D. 406.

There the railway company's by-law imposed upon a passenger who failed to produce a ticket, the liability to pay the full fare from the station whence the train started. The court held that a demand of the specific fare was necessary to put a passenger in default under this by-law.

The distinction which we are making, and which, in the nature of things must exist, is well exemplified by the case of the *Matter of Allen*, 116 Iowa, 697.

There, a son, having received a certain advancement from his parents, agreed that “should the parents or the survivor of them call for or require it, he would pay interest on such advancement at any rate required, not exceeding 6 per cent.” The son died and the mother filed a claim against his estate for interest under this agreement. Amongst other points urged by the defendant, was one, that the suit could not be maintained without a demand. The Supreme Court of Iowa so held, reversing the judgment below and saying (p. 700):

“In the case of an instrument providing for the payment of a fixed sum on demand, the

bringing of an action is a sufficient demand (citing cases). This rule is founded upon the principle that an obligation payable on demand is due at once, and it is the duty of the debtor to hunt up the creditor and tender payment. As applied to the ordinary instrument, *in which the amount of the debt is certain*, there are good reasons for this, but such reasons do not obtain in the case at bar. *Here the amount of the liability is uncertain. It was to be determined, within the set limit, by the creditor, and could be made certain only by a request or demand. Until the amount due was thus fixed surely no obligation rested upon the debtor to seek the creditor and proffer payment."*

The rule finds a further statement by the Supreme Court of New Hampshire in the case of

*Hayes v. Morrison*, 38 N. H. 90,

where it was held that under a general agreement to share future indefinite expenses, no action would lie in favor of either party against the other to recover his share of the joint expenses, until they had accounted together, or until the account had been presented, and its adjustment demanded. The court said that, if the agreement extended only to a definite liability for a sum certain, no demand would be necessary.

The case of

*Bunn v. Lett*, 65 Hun. 43.

illustrates the point precisely. There, Bunn held a bond and mortgage upon a building in the process of construction, owned by the defendant, Margaret Lett. She desired to raise some money and Bunn,



with a view of helping her in this effort, agreed to surrender his bond and mortgage, allow a new mortgage to be given, and himself take a subsequent one. Contemporaneously with this agreement, the two parties made a further agreement that, if at the end of six months Lett had not paid Bunn, he was to be at liberty to sell the new second mortgage at a discount, not exceeding ten per cent. in addition to \$100. for searching the title, if he found it necessary so to do, and that Lett would pay, on demand, the discount and the expense of searching the title. Bunn brought his action against Lett to recover such discount and the further sum of \$47.50 paid for the expense of searching the title. The complaint did not allege a demand nor was any proven upon the trial. At the close of the plaintiff's case a motion was made to dismiss the complaint upon the express ground of the absence of such allegation and the proof of a demand. This motion was denied, an exception taken, and the plaintiff had a verdict. Upon appeal by the defendant, the General Term reversed the said judgment for the failure to allege and prove the demand. The court (O'Brien, J.), after adverting to the general rule, that an agreement to pay a specific sum of money upon demand or at a specific time and place requires no demand other than the beginning of the suit, and citing the various decisions which have established such rule, goes on to say (pp. 46-48):

"The necessity for a demand becomes apparent when we remember that this was not an agreement by which a specified sum was to be paid at a particular time or place. The only definite part of the agreement was that the bond and mortgage were not to be sold until after the expiration of six months. It

is true that some evidence to vary this clause of the agreement was introduced, but for the purposes of the question now before us it may be disregarded, and the discussion proceed upon the theory that the contract in relation to the sale of the bond and mortgage, as it appears in the agreement, remained in full force and effect. It was not to be sold at all unless it was necessary; and, though deemed by the plaintiff to be necessary, it was still left with him as to when, after the six months, he would sell the bond and mortgage, and upon what discount, and what amount he should allow for searching the title. It will thus be seen that until notice was given by the plaintiff to the defendant, she could not have known whether or not the bond and mortgage were sold, nor for what amount; therefore, the extent of her liability was information she could only be put in possession of after the plaintiff had proceeded and sold the bond and mortgage, thus liquidating the amount which, under the covenant, the defendant was to pay him by reason thereof.

“As stated in the American and English Encyclopaedia of Law (vol. 5, p. 527): ‘It is necessary that a demand be made upon the party who is bound to discharge the obligation or perform the contract, unless, indeed, such party has incapacitated himself to discharge the one or perform the other.’ And again (p. 528): ‘Whenever the fact by which the defendant’s liability is incurred lies peculiarly within the knowledge and privity of the plaintiff, notice thereof must be given to the defendant.’

“Had it not been necessary for the plaintiff

to sell the bond and mortgage nothing would have been due from the defendant, assuming that it was paid when, by its terms, the bond and mortgage became payable. In other words, no liability could arise until the plaintiff exercised his option and sold upon terms which should not include a loss to the defendant of more than \$1,000; but how much less could only be ascertained when the plaintiff has sold the bond and mortgage and liquidated the amount. *We think that, as no specified amount was to be paid, as no time or place for payment was fixed, under such a contract when the parties themselves agree that it shall not be payable until after a demand, such circumstances create an obligation and make it essential to support the cause of action, that a demand should be alleged in the complaint and proved upon the trial."*

This case and the reasoning of the court seem to cover the case at bar in all respects.

The doctrine has received further enunciation in the case of

*Wangler v. Swift*, 90 N. Y. 38.

There, the plaintiff's assignors furnished one Jackson with certain materials and labor for a bridge which Jackson was building. Thereafter, the defendant agreed with Jackson's administratrix (for a satisfactory consideration) that he would pay the plaintiff's assignors such sum as should appear to be due them from her intestate "for work and material done and furnished by them in the construction of said bridge, under a certificate from the engineer in charge of said work \* \* \* and hold her harmless from any

claim of said assignors, which should be justified by the certificate of said engineer." No certificate of the proper engineer in charge was ever exhibited to the defendant before the trial. It was held by the Court of Appeals that such failure precluded the plaintiff from a recovery. The Court said (p. 43, 44):

"As the certificate was a necessary part of the plaintiff's case, and to be procured by him, *as without it the defendant could not know for what, or how much he was to pay, there could be no default on his part until informed of and shown a certificate, and a demand made thereon by the plaintiff.* Until then he could make no payment. His agreement is to pay Sherman & Kiyler the sum which should appear due, 'under' the certificate, 'all the engineer should certify they were entitled to.' This fact, when ascertained, would be known to the plaintiff, but not the defendant, and he could not be liable to an action until the certificate was submitted to him, or otherwise brought to his attention, and a demand made under it. Until then his contract was not absolute but conditional. It was dependent upon the act of the other party, who was to furnish the information to enable him to perform his promise.

"The case comes within the principle that notice is necessary where the thing lies more properly in the cognizance of the plaintiff than of the defendant (Vin. Abr., Notice, A., 2, Pt. 12), or as stated in *Vyse vs. Wakefield* (6 Mees. & Wels. 451) when 'It is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given to him.' Whether we take this literally

or as interpreted in *Lamphere v. Cowen* (42 Vt. 182), to mean to do a thing 'in an event which lies,' etc., it applies here.

"The certificate is the fact upon which the obligation of payment depends, and is wholly within the control of, and for the plaintiff's advantage, and so the case is also within the last clause of the rule stated by Chitty, which makes notice necessary where there is an express stipulation in the contract, or where it is requisite from the nature thereof that demand of performance be made.

"The very nature, if not the form, of the defendant's covenant requires the performance of such conditions. There was no precedent debt or duty upon the defendant. He undertook to pay, not the sum actually due from the estate of Jackson, but what should appear to be due under the certificate. The certificate then is parcel of the contract as much as his promise. Performance by him necessarily presupposes that it shall be procured prior thereto by the other party."

The case of

*Oaks v. Taylor*, 30 App. Div. 177,

also illustrates the same principle. There, Taylor sold certain shares of stock to Oaks, agreeing that "should the said Charles J. Oaks, his heirs or executors, wish or desire me at any time to buy and take back" the said shares, "I hereby promise and bind myself, my executors and administrators, to do so, paying the said Charles J. Oaks, his heirs or executors," the sum which Oaks had paid for the stock, with interest. Oaks sued Taylor on the agreement to take back the stock, and the question

was whether the Statute of Limitations had run. The contract was made in 1887. In 1891 the plaintiff exercised the option that the defendant should take back the stock and pay him the amount paid for it, and made demand of him to that effect. The defendant contended that the statute ran from the date of the contract, it being to do something *upon demand*. The plaintiff contended that his cause of action did not arise until he made his demand in 1891. The Appellate Division agreed with the plaintiff in this contention, saying (pp. 179-180):

"The case is different from that of a promissory note payable upon demand, for there the promise of the maker to pay is absolute, and the right to make the demand of the maker is complete the instant the note is made. (*Mills v. Davis*, 113 N. Y. 243.) *Here the promise to buy back and pay is not absolute, but conditioned upon the plaintiff's wish or desire, which may never exist.* In the case of the indorser upon the same promissory note a right of action does not exist against him until actual demand of the maker, and the Statute of Limitations does not begin to run until then (*Shutts v. Finger*, 100 N. Y. 539). That is, his liability is not absolute, but conditional, and the condition may never exist. Thus, the case of the indorser somewhat resembles the case before us. (See *Bunn v. Lett*, 65 Hun, 43; *King v. MacKellar*, 109 N. Y. 215),"

See also to the same effect as the foregoing cases

*Packard v. L. I. R. R. Co.*, 52 Misc. 98;

*Heinemann v. Brasch*, 53 Misc. 552.

It is confidently insisted that the lessee could have no right of action under the covenant under



consideration until after a statement by it of the amount of cost of conversion and a request for the expenditure by the lessor of that amount. So far as the request or demand is concerned, the plaintiff seems to have recognized the necessity of making such request and demand, as it has carefully alleged it as part of its cause of action. The complaint, however, is barren of any allegation that the plaintiff has ever presented to the defendant a statement of the cost of conversion equalling the amount for which it seeks to recover judgment or any other amount.

The presentation of such a statement is a condition precedent of any right of action under the covenant under consideration.

(b) The evidence fails to establish the demand alleged in the complaint, or any request or demand of the defendant to expend the sums sought to be recovered in this action in payment of the cost of the conversion of the railroads, as provided and required by Section V of the lease above quoted.

The only evidence of any demand upon the part of the plaintiff is that contained in the letter of Mr. Williams of March 2, 1900. (Minutes, vol. 6, pp. 2891-2896.) This letter enumerates certain charges on defendant's books as being improper charges against the \$6,000,000 fund mentioned in the lease, amounting in the aggregate to \$778,583.34, being \$1,221,416.66 less than the amount for which plaintiff demands judgment in this action, and then closes with the request for the prompt payment of the amount of such alleged improper charges to the plaintiff, and for an accounting as to the balance of the \$6,000,000 fund. There is not a suggestion in the letter of March 2d, 1900, that

the amount of the alleged improper charges and entries equals any cost for the conversion of the railroad nor is there a suggestion in the letter that the plaintiff has expended any portion of the amount which it requests payment of in the conversion of the railroad. On the other hand, it is apparent from the letter, that the writer treats Section V of the lease as a covenant to pay the plaintiff \$6,000,000 and that because of the alleged improper charges on the books of defendant company to the amount of \$778,583.34, the plaintiff requests an immediate payment of that amount as due to it under Section V of the lease, with interest from March 10th, 1894.

Now, it is clear beyond all question that Section V of the lease contains no covenant to pay any sum to the plaintiff out of the proceeds of the stock and bonds therein mentioned. The whole scope of the article and the extent of the obligation it creates is, taking that article alone and giving it its broadest signification, that the defendant shall expend the proceeds of the stock and bonds therein mentioned of the par value of \$6,000,000, from time to time at the request of the lessee, in payment of the cost of converting the demised railroads into an electric railroad, etc. Until that cost was ascertained by the actual doing of the work, the plaintiff was in no position to claim the expenditure by the defendant of a single dollar under the covenant contained in Section V of the lease. A naked demand by the plaintiff for the payment to it of the amount of the alleged improper charges on the books of the defendant was no request at all answering the requirements of Section V of the lease, upon which this action is based.

## POINT FOURTEENTH.

**The defendant should be re-imbursed for the annual taxes paid by it on the leased properties for the year 1893.**

At the close of the case, however, the plaintiff, misguided, gave evidence of the fact that the plaintiff had wrongfully taken from defendant a sum of about \$160,000 on the erroneous assumption that it was its duty to pay a portion of the taxes levied upon the properties in the year 1893. The error arose from a misunderstanding of the mode of laying the taxes under the old City of Brooklyn, changed by The Greater New York charter consolidating the cities. In Brooklyn taxes were laid in advance. For example, in 1892 the municipal officers of Brooklyn made up the budget in estimation of the expenditures necessary for the year 1893, all told. That amount, being the amount of the taxes for the year 1893, was levied upon the property within the city and became payable December 1, 1892. This tax the defendant paid, and, as the plaintiff went into possession of the properties actually on June 6, 1893, *pedis possessio*, and constructively on February 14, 1893, it was chargeable with one-half, if not with more, of this tax. Instead of this, plaintiff, treating the taxes levied and payable on December 1, 1893, as the taxes for 1893, which had already been paid by the defendant, it has charged to the defendant one-half of the taxes of 1894, and converted such moneys to its own use. By this system of accounting it got from the defendant wrongfully the taxes of an entire year.

POINT FIFTEENTH.

**The complaint should be dismissed and judgment rendered for the defendant with costs.**

WILLIAM C. TRULL,  
Attorney for the Defendant.

WILLIAM C. DE WITT,  
Of Counsel.







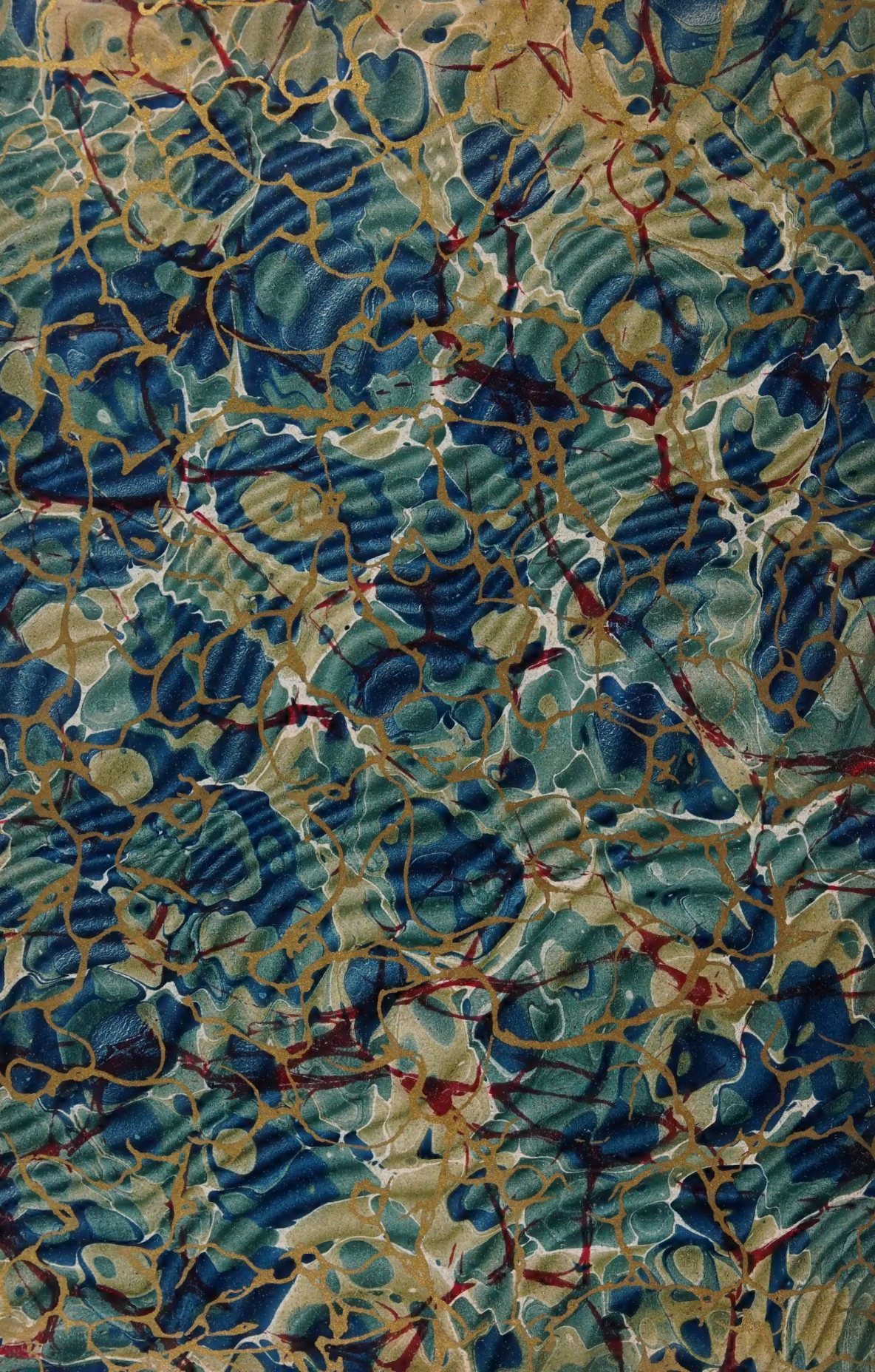














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